Supreme Court U.S.

265

Oct. 2. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~566~~ 227

THE UNITED STATES, APPELLANT,

vs.

WALTER PUGH.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 12, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 506.

THE UNITED STATES, APPELLANT,

vs.

WALTER PUGH.

APPEAL FROM THE COURT OF CLAIMS

INDEX.

	Original.	Print.
Petition	1	1
Traverse and plea	4	2
Plea of alienage	7	3
Final judgment	10	4
Application of defendants for allowance of appeal	11	4
Order allowing same	11	4
Findings of fact and conclusion of law	12	5
Request of claimant for additional findings of fact and ruling of the court thereon	15	5
Request of defendants for additional findings of fact and ruling of court thereon	17	6
Certificate	21	8

nations or under the laws and usages of war; and that no proceedings for the purpose of condemning said property have ever been instituted in any court or tribunal.

Your petitioner further shows that he is entitled to receive the net proceeds of said property, amounting to the sum of nine thousand seven hundred and ninety-one dollars and forty cents, ($9,791.40,) under the provisions of an act of Congress, approved March 12, 1863, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," and of the act in addition thereto, approved July 2, 1864.

3 Your petitioner further represents that he has always borne true allegiance to the government of the United States, and that he has never in any way voluntarily aided, abetted, or given encouragement to the rebellion against said government. Your petitioner therefore prays judgment for the said sum of nine thousand seven hundred and ninety-one dollars and forty cents, ($9,791.40,) as the amount justly due him, and which he is of right entitled to claim and receive from the treasury of the United States.

WALTER PUGH,
By B. D. WHITNEY,
His Attorney-in-fact.

I, B. D. Whitney, of Washington, D. C., attorney-in-fact for the above-named Walter Pugh, on oath declare and say that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that the claimant is justly entitled to the amount herein claimed of the United States, after allowing all just deductions; and that I believe the facts as stated in said petition are true.

B. D. WHITNEY.

DISTRICT OF COLUMBIA, }
CITY OF WASHINGTON. }

Personally appeared the above-named B. D. Whitney, and made oath that the above declaration, by him signed, is true, according to the best of his knowledge and belief.

JOHN RANDOLPH,
A Commissioner of the Court of Claims.

C. CUSHING,
Petitioner's Counsel, Washington, D. C.

4 In the Court of Claims. December Term, A. D. 1868.

WALTER PUGH
vs. } No. 3,202.
THE UNITED STATES. }

And the said defendants, by John J. Weed, their solicitor, come and make answer to the petition of the claimant on file herein,

and, not confessing the same, or any part thereof, do hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same. And as to so much of said petition as sets forth and avers that the United States are indebted to said claimant in the sum of nine thousand seven hundred and ninety-one dollars and forty, the defendants say that they are not indebted to said claimant in said sum of money, nor any part
5 thereof. And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against said government, the said defendants deny the truth of said allegation and call for proof thereof.

JOHN J. WEED,
Assistant Solicitor for the United States.

And for a further plea to said petition the defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant did not "within two years after the suppression of the late rebellion prefer his claim to the proceeds" of the property mentioned and described in his said petition in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12,
6 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States." And this the said defendants are ready to verify.

Wherefore the said defendants pray judgment, &c.

JOHN J. WEED,
Assistant Solicitor for the United States.

Filed May 21, 1868.

7 In the Court of Claims. December Term, 1868.

WALTER PUGH
vs.
THE UNITED STATES. } No. 3,202.

And the said defendants, by their attorney-general, come and make further and supplemental plea and answer to the petition of the claimant herein, by virtue and in pursuance of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the government, and for the better defence of the treasury against unlawful claims," approved July 27, 1868, and for such further and supplemental plea and answer, and in addition to any and all former pleas, answers, and defences heretofore interposed by the
8 defendants to the said petition, and not waiving or superseding such former pleas, answers, or defences, or either or

any of them, the defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made and done in the administration of and in virtue and under color of the act of Congress entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts
9 within the United States," approved March 12, 1863.

Whereby, and by virtue of the provisions of the act of Congress first above mentioned, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed July 17, 1869.

10 In the Court of Claims.

WALTER PUGH
vs.
THE UNITED STATES. } No. 3,202.

At a Court of Claims held at the Capitol, in the city of Washington, the 24th day of January, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Walter Pugh, claimant, do have and recover of and from the United States the sum of four thousand three hundred and sixty-two dollars and twenty-three cents ($\$4{,}362\frac{23}{100}$) out of the captured and abandoned property fund.

By the court:

A true copy of record.

11 In the Court of Claims. December Term, 1875.

WALTER PUGH
vs.
THE UNITED STATES.

To the honorable the chief justice and judge of the Court of Claims: The defendants appeal to the Supreme Court from the judgment of the court herein, and respectfully ask that the same be allowed.

THOMAS SIMONS,
Assistant Attorney-General.

Filed April 18, 1876.

Ordered, that the appeal be allowed as prayed for.

BY THE COURT.

12 Court of Claims.

WALTER PUGH
vs.
THE UNITED STATES.

Findings of Fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. In December, 1862, the claimant was in possession as owner of a plantation in Louisiana. The sugar and molasses described in the petition were a part of the products of such plantation, and were stored thereon, and in the possession of the claimant's agents.

II. In December, 1862, this said sugar and molasses were seized by the military forces of the United States and turned over
13 to a military commission, known as the sequestration commission, on the 12th January, 1863. The commission was directed by general order No. 8, Department of the Gulf, "to sell at public auction all property in its possession that has not been, or may not be, claimed or released, except such as may be required for the use of the army, and turn over the proceeds thereof to the chief quartermaster." The said sugar and molasses were then in the possession of the commission, on the 4th February, 1863, the commission caused the same to be sold with other property, at public auction in New Orleans. By the accounts kept by the commission it appears that the net proceeds of the sugar and molasses amounted to $4,362.23. It does not appear specifically that the proceeds were paid over to the chief quartermaster of the
14 Department of the Gulf, but it appears, and the court find the fact to be, that he received money at various times in the year 1863, from the sales of sugar and molasses in New Orleans, to the amount of $33,796.02. For this amount the chief quartermaster accounted on the final settlement of his accounts, and the same was credited by the Secretary of the Treasury to the abandoned and captured property fund in the treasury.

Upon the foregoing facts, and those found on the requests of parties, the conclusion of law is, that the claimant is entitled to recover $4,362.23. BY THE COURT.

Filed January 15th, 1876.

15 Court of Claims.

WALTER PUGH
vs.
THE UNITED STATES. No. 3,202.

The claimant, by his attorneys, respectfully request the court to find the following further facts, to wit:

III. That, as appears from the accounts of the chief quartermaster, the said amount of $33,796.02 was received by him as the

net proceeds of sales of sugar and molasses in New Orleans, and the whole of said amount was received in and subsequent to the month of February, 1863. That it does not appear what
16 became of the fund resulting from the said sale of claimant's sugar and molasses, unless the same was paid over to the chief quartermaster of the Department of the Gulf, in pursuance of said order of Gen. Banks, and was included in said sum of $33,796.02.

Upon the foregoing request the court makes the following order, to wit:

Allowed. E. & A. C. JANIN,
Attorneys for Claimant.

Filed January 21, 1876.

17 In the Court of Claims of the United States.
December Term, 1875.

WALTER PUGH
vs.
THE UNITED STATES. } No. 3,202.

The Attorney-General, on behalf of the United States, requests the court to find, in addition to their findings of fact filed herein, the following:

I. The said account kept by the sequestration commission, by which it appears that the net proceeds of the sale of claimant's sugar and molasses amounted to $4,362.23, as aforesaid, is as follows:

"Mrs. Walter Pugh, in account current with the United States Sequestration Commission.

1862.		*Dr.*	
Dec. 31st.	To charges, as per account Maj. W. O. Fiske, pro. marshal, for hauling, coopering,		
18	re-filling, and flatboat freight.....	$1,188	00
31	" supplies furnished by Major Fiske	148	30
1863.			
Jan'y 1st.	" freight on 75 hh. sugar, $15; 168 bbl. molasses, $3.....	1,629	00
" "	" tarpaulins and watching, 65 days.....	377	50
Feb'y 9th.	" proportioned amount of auction charges on sales of February 4, 1863..	109	01
9	" balance remaining with and to be accounted for by commission	4,362	23
		$7,814	04

1863.		C. R.	
Feb'y 9th.	By sales 57 hhd. sugar, 69,201, @ 7¼c.....	$5,017 07	
" "	18 " " 22,253, @ 7¾c.....	1,724 60	
" "	99 bbs. molasses, 4,224 gal., @ 15c.	633 60	
" "	69 " " 3,026, @ 14½c.....	438 77	
		$7,814 04	
1865.			
June 28th.	By balance.....	$4,364 23	

19 Upon the foregoing request the court makes the following order, to wit:

The court refuses this request as being evidence.

2d. The said amount of $33,796.02 is the sum of four distinct entries appearing in the account of receipts of the said chief quartermaster, as follows:

* * * * * * * * *

1863.				
Feby.	By cash rec'd. from Col. E. G. Beckwith, C. of S., for sale of molasses and sugar.....	$761 44		
* *	* * * * * * *	* *		
May 20.	" Net proceeds 211 bbl. molasses.....	$2,575 89		
	Less charges.....	3 00	$2,572 89	
" 25.	" Net proceeds on 294 hh. and 2 bbls. sugar.....	$29,373 10		
	Less charges.....	674 28	$28,698 82	
* *	* * * * * * *	* *		
Aug. 20.	" Net proceeds 139 bbls. molasses.....		$1,762 87	

20 Upon the foregoing request the court makes the following order, to wit:

The court refuses this request as being evidence.

3d. On June 13, 1863, the said commission notified the agent of Mrs. Walter Pugh, wife of the claimant, who had applied for release of a portion of the said proceeds, that the application was denied.

THOMAS SIMONS,
Asst. Atty.-Genl.

Upon the foregoing request the court makes the following order, to wit:

Allowed.

Filed January 22d, 1876.

The court delivered no opinion in this case.

21 In the Court of Claims.

WALTER PUGH
vs.
THE UNITED STATES. } No. 3,202.

I, John Randolph, Assistant Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the attorney-general for the defendants for the allowance of an appeal, as filed in the clerk's office April 18, 1876, and of the order of the said Court of Claims allowing the same, of the findings of fact by the court, and conclusion of law thereon, of the requests of claimant and defendants for additional findings of fact and the rulings of the court thereon.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this ninth day of Obtober, A. D. 1876.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Endorsed on back:) Court of Claims. No. 506. The United States, appellants, vs. Walter Pugh. Filed 12th October, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES, APPELLANT,
vs.
WALTER PUGH.
} No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES, APPELLANT,
vs.
WALTER PUGH. } No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANT.

STATEMENT.

The facts ascertained by the Court of Claims were these:

I. In December, 1862, the claimant was in possession as owner of a plantation in Louisiana. The sugar and molasses described in the petition were a part of the products of such plantation, and were stored thereon, and in the possession of the claimant's agents.

II. In December, 1862, this said sugar and molasses were seized by the military forces of the United States and turned over to a *military* commission known as the Sequestration Commission.

On the 12th January, 1863, the Commission was direct-

ed, by General Order No. 8, Department of the Gulf, "to sell at public auction all property in its possession that has not been, or may not be, *claimed* or released, except such as may be required for the use of the Army, and turn over the proceeds thereof to the chief quartermaster." The said sugar and molasses were then in the possession of the Commission. On the 4th of February, 1863, the Commission caused the same to be sold, with other property, at public auction in New Orleans.

By the accounts kept by the Commission it appears that the net proceeds of the sugar and molasses amounted to $4,362.23. It does not appear specifically that the proceeds were paid over to the chief quartermaster of the Department of the Gulf, but it appears, and the court find the fact to be, that he received money at various times in the year 1863 from the sales of sugar and molasses in New Orleans to the amount of $33,796.02. For this amount the chief quartermaster accounted on the final settlement of his accounts, and the same was credited by the Secretary of the Treasury to the abandoned and captured property fund in the Treasury.

III. That, as appears from the accounts of the chief quartermaster, the said amount of $33,796.02 was received by him as the net proceeds of sales of sugar and molasses in New Orleans, and the whole of said amount was received in and subsequent to the month of February, 1863. That it does not appear what became of the fund resulting from the said sale of claimant's sugar and molasses, unless the same was paid over to the chief quartermaster of the Department of the Gulf, in pursuance of said order of General Banks, and was included in said sum of $33,796.02. (Record, 5, 6.)

IV. On June 13, 1863, the said Commission notified the agent of Mrs. Walter Pugh, wife of the claimant, who had applied for the release of a portion of the said proceeds, that the application was denied. (Record, 7.)

Upon these facts the claimant had judgment for $4,362.23. (Record, 5, folio 14.)

ASSIGNMENT OF ERROR.

The United States assign for error the judgment rendered in favor of Walter Pugh for $4,362.23 upon the facts found, which do not sustain such judgment, but require one in favor of the defendants below and present appellants.

BRIEF.

The objection to the judgment here appealed from lies upon the surface.

To authorize a recovery of the proceeds of captured or abandoned property, these facts are essential to be proved: The original ownership of the property; its capture after March 12, 1863; that its proceeds actually reached the Treasury of the United States; and that the petitioner has a right to those proceeds, which he has not lost by adherence to the rebellion, but has asserted in the proper tribunal within the prescribed time. These are, each and all, jurisdictional facts, and the failure to prove any one of them deprives the court of authority to render judgment in favor of a petitioner. (Hayeraft *v.* United States, 22 Wallace, 92; Carroll *v.* United

States, 13 Wall., 152–3; Spencer *v.* United States, 91 U. S., 577–8.)

The brief opinion in Spencer's case disposes of the cause at bar. "It is certain that no suit can be maintained against the United States under the abandoned and captured property act, if the property has neither been captured, seized, nor sold *pursuant to its provisions*, and the proceeds are not in the Treasury." (91 U. S., 578, top.)

The captured and abandoned property act was approved March 12, 1863. (See 12 Stats., 821.) Like all statutes, it was *prospective* in its operation.

It was intended to regulate the disposition of property *thereafterwards* captured, or coming into Federal possession; not to affect that already seized by virtue of the order of the general commanding a department. It is matter of history that General Butler issued an order in November, 1862, declaring sequestered all the property in La Fourche district west of the Mississippi, and in that part of Louisiana east of the river, except the parishes of Orleans, Saint Bernard, and Plaquemines, and appointed the Commission mentioned in the record to work the plantations and collect and sell, for the public benefit, the property of disloyal persons. Antecedently to statutory authority, the commanding general, as such, had this right of capture and condemnation. Without citing cases and books that have so often been referred to before you, I will mention only the opinion of Mr. Justice Swayne in Coolidge *v.* Guthrie, 8 Am. Law Reg. (N. S.), 24–25, for May, 1874. We will add the case of Smith *v.* Brazelton, 1 Heisk., 59–61, *et seq.* These and many others were quoted fully in my brief in the case

of Young, trustee of Collie, *vs.* United States, No. 781 of last term.

The Sequestration Commission had and exercised the right of determining the loyalty of the petitioner, and the consequent liability of the property to forfeiture Its decision is no more reviewable by the Court of Claims than would be the judgment of any district court condemning libelled property to forfeiture. This jurisdiction was conferred by Article X of General Butler's order of November 9, 1862, constituting this tribunal. It is not understood how the language of the opinion in Moore's case (10 Ct. of Cl., 382, 383) can be reconciled with the judgment in the cause at bar. The sugar and molasses in controversy were not seized under the act of July 17, 1862, nor of March 12, 1863. If it were taken under the former statute, that would confer no authority over it upon the Court of Claims, because it would still be a military seizure and condemnation of which that court has no jurisdiction (see act of July 4, 1864, c. 240, § 1, 13 Stats., 381), and because it is only of the proceeds of "*such* abandoned or captured property" *collected by Treasury agents* "*from* and *after* the passage of this act" of March 12, 1863 (12 Stats., 820, §§ 1 and 3), that the Court of Claims is to supervise the distribution. The act of July 17, 1862, can have no effect to extend this power or obligation. That of July 4, 1864, c. 225, is equally prospective in its operation. (13 Stats., 375.) The money obtained for the Pugh sugar never came into the hands of any such Treasury agent, any more than did the property itself; but it is only *their* collections which constitute a trust fund for those showing themselves entitled "*by that act.*" (Klein's case, 13 Wall., 138, bottom; Haycraft's case, 22 Wall., 95, top; Spencer's

case, 91 U. S., 578.) It may be remarked that while the Chief Justice's classification of property in Klein's case (13 Wall., 136) is accurate enough, as applied by him, to seizures after March 12, 1863, it is not correct as to previous seizures made under the general laws of war, and without statutory regulations. Congress left all transactions prior to March 12, 1863, to be governed by the law existing when they occurred, and merely prescribed what should be done in the future.

Observing the exact language of the opinion in Spencer's case (91 U. S., 578, top), we say this property was not captured or seized under the provisions of the act by virtue of which it is sought to maintain this suit, for it had not then been passed; nor, for the same reason, was it sold pursuant thereto; nor is there any evidence that its proceeds are in the Treasury: certainly *they are not there as part of the abandoned and captured property trust-fund.* The error of the Secretary of the Treasury in crediting to that fund the $33,796.02 received from the quartermaster (assuming this sum came from the Sequestration Commission) cannot affect its legal relation when the facts are known.

These sugars and molasses were turned over by the captors to a Sequestration Commission, which was part of the machinery of administering the military law then predominant at New Orleans (Record 5, folio 13, first line); by this Commission (not by a Treasury agent) it was sold, in obedience to military orders, and not in conformity to any legislative enactment, since the sale was more than a month before the law was passed; its proceeds were to be turned over to the chief quartermaster, and not directly into the Treasury, if this $4,362.33 can, by any

possibility, be *conjectured* to be part of the $33,796.02 mentioned; and, if turned over at all, and if it ever reached the Treasury, it was because General Banks so ordered, and not because the law required it. Had any military exigency demanded the use by General Banks of this sugar, or of its proceeds, he would have been justified in appropriating it. If its use were not thus necessary, of course, because it belonged to the United States as captor, its proceeds should have gone into the Treasury, but not as a statutory trust-fund.

This question of the jurisdiction of the Court of Claims over proceeds of captures made prior to March 12, 1863, has divided that tribunal, Chief Justice Drake dissenting from the position of his associates in Terry's case (8 Ct. of Cl., 277, 280), although he had acquiesced in the doctrine he found established when he first took his seat upon that bench. (See Minor's case, 6 Ct. of Cl., 393.)

The claimant should prove affirmatively that the proceeds of his property are in the Treasury, and, as we say, that they are there as part of the trust-fund. It is part of his case, and the burden is upon him. If he fails to show this (as he has failed), it is like the failure of any other plaintiff to make out a complete case. He must be nonsuited.

He only traces this sugar and molasses, and its proceeds, into the hands of the military Sequestration Commission. There was an order that the proceeds of all property "that had not been or may not be *claimed* or released, except such as may be required for the use of the Army," should be turned over to the chief quartermaster. Of course, as to property *released*, there was noth-

ing more could be done about it; such as the Army needed was to be used, and the owner had no claim whatever for its value. Then that to which *claim* had been made was to be held subject to the decision of the commanding general, who could revise the adjudication of the Commission, whether favorable or adverse to the claim. For this reason *claimed* proceeds were *not* to be turned over. Into this category came the money representing the Pugh property. By the item "3d" of the finding requested by the United States (Record, 7) it is seen that there was a "claim" made by Mrs. Pugh to an indefinite "portion of the said proceeds." Though the *Commission* denied this application so late as June 13, 1863, *non constat* but that it was allowed by General Banks. At all events the pending *claim* explicitly excepted it from the Order No. 8, of January 12, 1863. So the presumption is *against* the payment of these proceeds to the chief quartermaster. The Court of Claims, in the second finding, say: "It does not appear specifically that the proceeds were paid over to the chief quartermaster of the Department of the Gulf; but it appears, and the court finds the fact to be, that he received money at various times in the year 1863 from the sales of [some] sugar and molasses in New Orleans, to the amount of $33,796.02." (Record, 5, folio 110.) Whatever money the chief quartermaster *did* receive, he duly paid over; but it does not appear, as to this specific fund, that he ever did receive it. After reading this finding the claimant asked for and obtained one to the effect that it did not appear what had become of the proceeds of Mr. Pugh's property if it had not gone into the hands of the quartermaster. (Record, 6, top.) That is to say, the counsel did not contend that it had been

proved that it *did* go into the hands of that officer, but that it did not appear affirmatively, by defendants' evidence, that it did *not* go there, or what had become of it. This finding attempts to throw the burden of proving that it has *not* had the proceeds of this particular sugar or molasses upon the government.

Counsel lays great stress upon the word "specifically," as used by the court, italicizing and capitalizing it in his brief. The difference between us is this: He contends that a thing which the court says does not appear "specifically" must be assumed *here* (by you) as existing by force of an inference from that which does appear; while I say that, for this court to act upon it, the fact *must* appear upon the record "specifically"—*i. e.*, distinctly, or (as Richardson defines it in his dictionary) *so as to be seen that it exists*—or its existence will not be presumed. I would further observe that the finding is expressed as it is *because* the Court of Claims not only found no specific proof of the fact, but were doubtful whether the facts which were found would justify them in inferring that which is disputed. They stated the result of evidence in this way because they were not fully satisfied that these things amounted to proof of the proceeds reaching the Treasury. If, then, the tribunal which determines the facts was in doubt as to the existence of one essential element of the plaintiff's claim, and hence did not find and state it, this court cannot assume its existence. If that court had been convinced by the evidence that the proceeds of the petitioner's property were in the Treasury, it would have so said succinctly—"only this, and nothing more."

I will further say that, after that court say what

"does *not* specifically appear," it goes on to state all that *does* specifically appear and what it "finds the fact to be," and all that it is able, from the testimony produced, to find as fact, namely, "that he [the chief quartermaster] received money at various times in the year 1863, from the sales of sugar and molasses in New Orleans, to the amount of $33,796.02. For this amount the chief quartermaster *accounted on the* FINAL *settlement of his accounts*, and the same was *credited by the Secretary of the Treasury* to the abandoned and captured property fund in the Treasury." (Record, 5, folio 14.)

As matter of fact, then, these proceeds never were in the Treasury, if we guess them to be part of the $33,796.02 for which the chief quartermaster *accounted*. So far as Mr. Pugh is concerned, at least, this sum represented property seized by our Army, under orders of the commanding general, who constituted the tribunal, administering martial law, which condemned it, and, under like orders, sold it, and were then directed to turn over the proceeds of that to which no claim was pending to the chief quartermaster. The chief quartermaster did *not* pay it into the Treasury; he used it for the benefit of the forces for which he had to provide; but, being public property, he was compelled to enter it upon his account, and, upon the final adjustment, showed that he had disbursed it legitimately. Thereupon the Secretary of the Treasury assumes to credit upon paper to the abandoned and captured property fund in the Treasury money which, in fact, never was there; which, instead of being turned in by Treasury agents as the results of property sold by them, was procured by a military levy and went into and out of the military chest for military purposes. A credit shown to be so erroneous and unauthorized can

afford no basis for a legal claim. His act creates no estoppel upon the government. The facts being stated, the court will perceive and correct the error into which he fell. (P. M. Gen. *v.* Early, 12 Wheat., 148; Decatur *v.* Paulding, 14 Peters, 515; United States *v.* Wright, 11 Wall., 648.) The Secretary of the Treasury had no *discretion* what sums to enter to the credit of this fund, but was legally bound to enter only those moneys actually there.

Here are two serious gaps in the plaintiff's chain of evidence. In the first place, there is no proof that the proceeds of his property were ever paid over to the chief quartermaster by the Sequestration Commission, but the presumption is the other way, because of its exclusion from the terms of Order No. 8, by reason of the pending claim thereto; and if "the physical eyesight of the Supreme Court," of which counsel speaks (see his brief, p. 4, top), is directed to the seventh page of the record, to which he adverts, it will be seen that no item of those making up the $33,796.02 corresponds with either of those of the sales of the Pugh sugar and molasses, and that all but the last ($1,762.87) were paid over prior to June 13, 1863, when the Commission is shown to have had the Pugh funds in custody; and, in the second place, if the chief quartermaster is, without proof to support the supposition, assumed to have received the money, it is distinctly shown that he did *not* pay it into the Treasury, but used it for current disbursements, accounting for it as he would for money sent to him *from* the Treasury, and not as if it had been forwarded by him *to* the Treasury. Being consumed in this way, there is no more propriety in saddling it upon the abandoned and captured property fund than there would be the value of

the corn devoured by Sherman's army in its march from Atlanta to the sea. Certainly there is nothing in the act of March 12, 1863, nor in subsequent enactments, to indicate a purpose to give such a retroactive effect to the statutes as to include in the trust-fund the proceeds of property long before seized, as capture jure belli, and thus applied to military use.

It has been already suggested that the Court of Claims couched their findings in the language cited *because* not satisfied nor willing to declare that the proceeds of Pugh's property did reach the Treasury. Again presenting that idea in this connection, I will close with a brief response to the claimant's argument that "the court, however, must have been satisfied of the fact or they could not have given judgment for the claimant." (Claimant's brief, p. 8, lines 17 to 19.) *Non constat.* That is arguing in a circle; the judgment is not erroneous because based on this fact; and the fact must be accepted because of the rendition of the judgment. If the judgment itself supplied the place of findings, then *no* findings would be necessary in many cases. Pursuant to the rules prescribed for appeals from the Court of Claims, they should state explicitly the facts upon which the judgment is founded; if these do not sustain or justify such judgment, it is erroneous.

The phraseology of the third finding, framed by claimant and allowed upon his request, shows that he did not *then* consider the court to have in effect found the existence of funds in the Treasury.

After discussing the question (pp. 8 and 9), the counsel comes to the conclusion stated at the bottom of page

9 and top of the tenth page of his brief, that "apparently the question now presented to the Supreme Court is whether or not it is a legitimate presumption of *law*, from the circumstantial facts set out in the findings, that our proceeds are in the Treasury." That this independent, substantive, jurisdictional *fact* cannot be *presumed*, as a matter of law, I think decided by U. S. *v.* Ross, 92 U. S., 281 to 285; and I will offset that opinion against the one cited by him as rendered by the Court of Claims in the same cause. (12 Ct. of Cl., 571.)

That the judgment for the plaintiff below did not *necessarily* import a belief of that co[illegible] in the existence of the fact of the funds having rea[illegible] be seen by referring to the cases [illegible] others, where the facts were di[illegible] the legal conclusions and to the judgments.

EDWIN B. SMITH.

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That the judgment for the plaintiff below did not *necessarily* import a belief of that court in the existence of the fact of the funds having reached the Treasury can be seen by referring to the cases of Meigs, and of many others, where the facts were diametrically opposed to the legal conclusions and to the judgments.

95 US 749 top

EDWIN B. SMITH.

In the Supreme Court of the United States

OCTOBER TERM, 1878.

UNITED STATES, APPELLANTS,
vs.
WALTER PUGH, APPELLEE.
} No. 227.

FROM THE COURT OF CLAIMS.

APPELLANTS' REPLY.

In the Supreme Court of the United States.

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No. 227.

FROM THE COURT OF CLAIMS.

APPELLANTS' REPLY.

A few words will be added, by way of reply, applicable to the position of the Court of Claims that the act of July 2, 1864. ch. 225, § 3 (13 Stats., 376, and appellee's reply, pp. 8 and 9), gave that tribunal jurisdiction over property captured prior to March 12, 1863.

It will be necessary first to analyze the statutes of July 13, 1861, of July 17, 1862, and of March 12, 1863, to see what property is referred to in each, before determining whether the act of July 2, 1864, extended the jurisdiction of the Court of Claims, conferred by the act of March 12, over property captured as Mr. Pugh's was; and, secondly, whether it acted retrospectively as to the proceeds of property which had been already sold and

its avails used under the general laws and usages of war, or as directed by previous legislation.

The first section of the act of July 2, 1864 (13 Stats., 375, and claimant's second brief, 8), permits captured property to be sold in the insurrectionary States. The second section is the first authority given for *leasing* abandoned plantations. Then we come to section 3, to which the Court of Claims has given the construction, the correctness of which is questioned upon this appeal. Its first clause requires the payment into the Treasury of all moneys accruing from three sources, viz, from such leases, from sales, and from fees. It then proceeds to extend the first section of the act of March 12, 1863, to include property mentioned in the act of July 13, 1861, and July 17, 1862. The first section of the act of March 12, 1863 (12 Stats., 820, and claimant's second brief, 6), simply directs the collection of "all abandoned and captured property"; the act of July 13, 1861, section 5 (12 Stats., 255, and claimant's second brief, 5), forfeits all goods and chattels, wares, and merchandise coming from an insurrectionary to a loyal State, or *vice versa;* so that the extension clause of the act of July 2, 1864, makes the first section of that of March 12, 1863, cover property seized for violation of the non-intercourse act. The fifth section of the act of July 17, 1862 (12 Stats., 590), authorizes the seizure of all the estate and property, money, stocks, credits, and effects of certain persons who are enumerated in six classes, *into no one of which does Walter Pugh come;* and the use of such property and its proceeds is to be for the support of the armies of the United States. By extending the act of March 12,

1863, section 1, over this property (as was done by this act of July 2, 1864), it was thenceforth to be treated as captured and abandoned property, as to the disposition of proceeds. The third section of this act of July 2, 1864, to which the Court of Claims attributes such a retroactive efficacy as to embrace this cause, then proceeds to say that section six of the act of March 12, 1863, is amended to include every description of property mentioned in the two acts (of July 13, 1861, and July, 17, 1862) which we have just examined. Section six of the act of March 12, 1863 (claimant's second brief, 7), is the one requiring all officers and soldiers, under the severest penalties, to turn over all cotton, sugar, rice, &c., which comes into their possession to the Treasury agents appointed under that act. This last extension clause of the act of July 2, 1864, then, is merely a complement, or necessary corollary, of those which precede; for, inasmuch as the seized property—taken for violation of the non-intercourse act of July 13, 1861, or as belonging to one of the persons mentioned in that of July 17, 1862—was, by this act of July 2, 1864, to be thenceforward treated as abandoned and captured property had theretofore been treated, it was essential to provide that the captors or seizors should turn such property also over to the Treasury agents. But Mr. Pugh's sugar (as before stated) did not come into the category of either act, of 1861 or 1862.

The construction of this act of July 2, 1864, by the Court of Claims, and the argument of the claimant, necessarily assume that this statute is retrospective; whether it is so or not is immaterial, if the previous statutes of 1861 and 1862 do not include property that was *captured* by our armies in hostile territory; but

this very reference to section 6 of the act of March 12, 1863, shows that that of July 2, 1864, is not retrospective. That is to say, no officer or soldier could be cashiered or otherwise punished after July 2, 1864, because prior to that day he had not turned over to Treasury agents property seized *in transitu* between loyal and rebellious States or belonging to the persons specified in the act of July 17, 1861. Up to July 2, 1864, it was required by law that such property as came within the purview of the acts of 1861 and 1862 should be libeled in the district courts; therefore, till that day the Treasury agents had no concern with it; after that day they alone were entitled to its custody; hence, the act of July 2, 1864, cannot be retrospective.

The ordinary presumption is that a statute is to operate prospectively; the contrary construction is never given unless *clear* and *express* words require it. (Prince *vs.* United States, 2 Gall., 204, where "all goods captured" were held to mean "all goods *hereafter* captured," &c.; Young *vs.* Hughes, 4 H. & N., 76; Van Sittart *vs.* Taylor, 4 El. & Bl., 910; Dash *vs.* Van Kleek, 7 Johns., 477.)

The right of the government had *rested* as to all captures made prior to March 12, 1863.

It applies with special force to this act of July 2, 1864. By precedent legislation property was to be seized, libeled, and condemned, and it or its proceeds used for the support of the Federal armies; to make this act of July 2, 1864, retrospective would not only require an accounting for property already condemned by due process of law (Knote *v.* U. S., 95 U. S., 149), but would oust the district courts of jurisdiction over causes which

were *in fieri* when this act of July 2, 1864, was approved. Condemned property in the hands of the marshal would have to be passed over to another functionary for sale, &c. The consequences would be too material and serious and the unnecessary complication of affairs too great for us to suppose Congress intended any such retroactive effect.

Nor is there aught in the phraseology of this act of July 2, 1864, evincing a purpose to make its provisions retroactive. (United States *vs.* Heth, 3 Cranch, 409.) The first section authorizes the sales of captured property in places within the insurrectionary States, which by previous enactment were required to be in the loyal States. This must be prospective.

The second section for the first time authorizes the leasing of plantations. This could only operate prospectively.

The third section says that the moneys derived from this and other sources shall be paid into the Treasury; and then extends the first and sixth sections of the act of March 12, 1863, over the property named in the acts of 1861 and 1862; why is not this extension as clearly prospective as the preceding provisions?

The subsequent sections, if examined, will yield the same result. The fourth says the prohibition of commercial intercourse shall extend to that between places within and those without the lines of military occupation; clearly prospective. (13 Stats., 376.)

The next (section 5) further extends this prohibition to such portions of the loyal States as may at any time be in dangerous proximity to places under insurgent control. (*Ib.*) The army under General Lee were at the date of this act (July 2, 1864) about to enter upon

the soil of a loyal State, and just a year before had been in Pennsylvania.

The sixth section substitutes a new method instead of the one before established for the distribution of fines, penalties, and forfeitures. (13 Stats., 377.)

The seventh says property seized on inland waters shall not be deemed maritime prize. (*Ib.*)

The eighth authorizes the appointment of agents to buy the products of insurrectionary States for Federal use. (*Ib.*)

The ninth restricts the right given the President by the act of July 13, 1861, to license trade with the insurrectionary States. (*Ib.*)

The tenth denounces punishment against officers and others from dealing in any of the property mentioned, &c. (13 Stats., 378.)

The eleventh and last section gives authority to the Secretary of the Treasury to make rules for the carrying out of the provisions of this act.

If anything can be found to indicate a purpose to make any portion of this statute operate retrospectively I have failed to discover it.

My friend, Mr. Janin, cites and prints several decisions of the Court of Claims in support of its ruling in the cause at bar; that is, he supports its determination of the present cause by showing it has previously held the same doctrine. Some of them do not sustain even this proposition. The first cited (Hudnal's case, 3 C. Cls. R., 291, claimant's second brief, 10) was to recover the proceeds of cotton seized in November, 1863—eight months after the captured and abandoned property act

took effect. The utmost extent this decision goes (whether right or wrong in so holding) is that the proceeds of property captured *after* March 12, 1863, may be treated as *constructively* in the Treasury, though actually disbursed by a quartermaster for military uses. While we doubt the correctness of this position, for reasons sufficiently assigned in the opening argument, its inapplicability to the present state of facts relieves us from the necessity of any further examination of it. It is true, as stated by Casey, C. J., that, in so using Hudnal's cotton, Colonel Holabird "either overlooked or entirely disregarded the provisions of that law"—of March 12, 1863. He could not violate any such provisions in his application of Pugh's sugar, because they had not then been brought into existence by Congress.

Barringer's and Moore's cases (claimant's second brief) and the others there cited seem to assume the ground now held by the Court of Claims. Attention is invited to the fact that the moneys derived from property sold in 1861, 1862, and 1863 are not credited by the Secretary of the Treasury to the abandoned and captured property fund until 1865. It is well known that the legislature and the Executive were not then in harmony as to the proper method of dealing with citizens of the rebellious States and with their property, and that the Executive action was not according to legislative intent.

That the Court of Claims had given these decisions without appeal being taken cannot affect the true construction of the law. Every administrative officer must act according to his own sense of duty. Our predecessors in this department did not feel called upon to appeal from the reiterated decisions of the Court of Claims abrogating the statute prohibiting assignments; but after

this "department has acquiesced for a long time" (claimant's second brief, 27, middle), the present administration felt constrained to appeal, and the propriety of such action was justified by the result of Gillis's case. (95 U. S., 407.)

What counsel observes at the middle of page 27, that "the judgment of this court seems never to have heretofore been sought on the subject, although there have been many opportunities for so doing," is as true of the issue raised in Gillis's case as of the one now presented.

It was near the close of a century of national existence that the question of the right of eminent domain and of the propriety of the Federal court taking jurisdiction of the condemnation proceedings under the judiciary act of 1789 was first determined in Kohl *vs.* United States (91 U. S., 367). Theretofore the procedure had generally been in the State courts.

Whatever conclusion may be reached, I am satisfied the court will think the question now presented sufficiently doubtful to justify a resort to the court of last resort, to which it is now respectfully submitted, with a readiness heartily to acquiesce in its determination, whatever that may be.

EDWIN B. SMITH,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 227.

THE UNITED STATES, APPELLANT,

vs.

WALTER PUGH.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

EDWARD JANIN,
Of Counsel for Appellee.

Judd & Detweiler, Prs.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 227.

THE UNITED STATES, APPELLANT,

vs.

WALTER PUGH.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

The petition claims the proceeds, now in the Treasury, of sugar and molasses seized by the military in Louisiana, in December, 1862, delivered to and sold by the Sequestration Commission established at New Orleans, and the proceeds paid into the Treasury.

The United States filed various defences, but have never filed a scrap of evidence in support of them.

The case was tried before Judges Drake, Nott, and Richardson. The court filed its findings of fact January 15, 1876, as follows, (Rec., 5:)

Court of Claims.

WALTER PUGH *vs.* THE UNITED STATES.

Findings of Fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. In December, 1862, the claimant was in possession as owner of a plantation in Louisiana. The sugar and molasses described in the petition were a part of the products of such plantation, and were stored thereon, and in the possession of the claimant's agents.

II. In December, 1862, this said sugar and molasses were seized by the military forces of the United States and turned over to a military commission, known as the Sequestration Commission, on the 12th January, 1863. The commission was directed by General Order No. 8, Department of the Gulf, "to sell at public auction all property in its possession that has not been, or may not be, claimed or released, except such as may be required for the use of the army, and turn over the proceeds thereof to the chief quartermaster." The said sugar and molasses were then in the possession of the commission; on the 4th February, 1863, the commission caused the same to be sold with other property, at public auction in New Orleans. By the accounts kept by the commission it appears that the net proceeds of the sugar and molasses amounted to $4,362.23. It does not appear specifically that the proceeds were paid over to the chief quartermaster of the Department of the Gulf, but it appears, and the court find the fact to be, that he received money at various times in the year 1863, from the sales of sugar and molasses in New Orleans, to the amount of $33,796.02. For this amount the chief quartermaster accounted on the final settlement of his accounts, and the same was credited by the Secretary of the Treasury to the abandoned and captured property fund in the Treasury.

Upon the foregoing facts, and those found on the requests of parties, the conclusion of law is, that the claimant is entitled to recover $4,362.23. BY THE COURT.

Filed January 15, 1876.

On January 21, 1876, at the request of claimant, the court allowed the following further findings, (Rec., 5, 6:)

Court of Claims.

WALTER PUGH
vs.
THE UNITED STATES. } No. 3202.

The claimant, by his attorneys, respectfully request the court to find the following further facts, to wit:

III. That, as appears from the accounts of the chief quartermaster, the said amount of $33,796.02 was received by him as the net proceeds of sales of sugar and molasses in New Orleans, and the whole of said amount was received in and subsequent to the month of February, 1863. That it does not appear what became of the fund resulting from the said sale of claimant's sugar and molasses, unless the same was paid over to the Chief Quartermaster of the Department of the Gulf, in pursuance of said order of Gen. Banks, and was included in said sum of $33,706.02.

Upon the foregoing request the court makes the following order, to wit:

Allowed.

E. & A. C. JANIN,
Attorneys for Claimant.

Filed January 21, 1876.

And on January 22d, 1876, the Court allowed one finding at the request of the Assistant Attorney General as follows, (Rec. 7, *bottom* of page.)

3d. On June 13, 1863, the said commission notified the agent of Mrs. Walter Pugh, wife of the claimant, who had applied for release of a portion of the said proceeds, that the application was denied.

THOMAS SIMONS,
Assistant Attorney General.

Upon the foregoing request the Court makes the following order, to wit:

Allowed.

Filed January 22d, 1876.

The Court delivered no opinion in this case.

The Assistant Attorney General had at the same time requested the Court to make two other further findings. (Rec., 6, 7.) The Court refused these requests on the ground, and because, most clearly, they were requests to find details of evidence.

It is impossible that the Assistant Attorney General in charge of the business of the Court of Claims, could have imagined that the Court would make these findings. The

requests were made because they offered an irresistible means of forcing upon the physical eyesight of the Supreme Court certain selected fragments of evidence.

There was no way to prevent his so evading the intention of the rules regulating appeals from the Court of Claims.

Rule 5 (promulgated Dec. T., 1869, 9 Wall.) provides that either party may submit to the Court "a written request to "find specifically as to the matter of fact which such party "may deem material to the judgment in the case, and if "the Court fails or refuses to find in accordance with such "prayer, then such *prayer* and refusal shall be made a *part* "*of the record* certified on the appeal to this Court."

Under this rule it was only necessary to incorporate these fragmentary details of evidence into his *prayer*—to make them a part of his prayer—in order to secure their insertion into the record before the Supreme Court. The purpose of this Rule 5, *and the other rules on these appeals*, is clearly stated in Mahan *vs.* United States, 14 Wall., 109. They are framed with the express intention of keeping the evidence out of the record on appeal.

Nevertheless, in this case, that intention is evaded, and what purport to be portions of the evidence are *physically* in the record.

This Court will not regard them however.

The findings are refused, and consequently there is no certification as to the truth of anything involved in the requests; and there is certainly nothing alluded to in these requests but the merest evidence, and if this Court would look at evidence at all, it would require the whole to be exhibited, and not mere fragments selected by one of the parties, unchecked by his adversary or the Court of Claims. We say unchecked by his adversary, for it is a matter between the one party and the Court, and the other party has no notification of it.

The Court ordered the entry of judgment for $4,362.25,

the amount of the net proceeds, to be paid out of the captured and abandoned property fund, on January 24th, 1876. (Rec., 4.)

The application for allowance of appeal was filed April 18, 1876, (Rec. 4.)

The record on appeal was not however filed in the Supreme Court until October 12, 1876.

At the October term, 1877, claimant moved this court, that the record "herein be remanded to the Court of Claims with directions to said court to certify:

"Whether the proceeds of claimant's sugar and molasses did or did not constitute a part of the $33,796.02 received by the chief quartermaster of the Department of the Gulf in 1863, *as proceeds of sugar and molasses*, and accounted for by him and credited to the abandoned and captured property fund in the Treasury."

The directions to the Court of Claims thus asked for, are framed in exact accordance with the second of those made by this Court in the sundry cotton cases of Raymond and others. (92 U. S. R., 651.) Sec. 11 Court of Claims Rep., 501, where the directions are set out.

The appellant opposed the motion hotly, both orally and (after the Court had suggested that the record be printed) by brief.

The brief styled the motion one intended to procure "*additional findings*" which certainly was not its character. It was a motion that the Court of Claims might be called upon, as they had been in previous cases, to "*certify*," *i. e. make certain*, an important fact which they must have been satisfied of, (or they could not have given claimant judgment,) but of which they had said that it did not "appear SPECIFICALLY."

The brief for the United States insisted that this meant it did not appear *at all*.

We give the beginning of that brief, as it suggests distinctly the only possible question now in this case.

"*Appellant's Brief upon Motion for Additional Findings.*

"The appellee's motion is one that goes to the merits of the whole case, and must settle it. It is opposed for the following reasons:

"It asks this Court to direct the Court of Claims to find as to a fact of which that Court has already said there is no evidence. In the second finding it is said: 'It does not appear specifically that the proceeds were paid over to the Chief Quartermaster of the Department of the Gulf; but it appears, and the Court finds the fact to be, that he receivd money at various times in the year 1863, from the sales of sugar and molasses in New Orleans, to the amount of $33,-796.02.' This amount was turned into the captured and abandoned property fund in the Treasury. (Record, 5, folio 14.) That is to say, whatever money the Chief Quartermaster *did* receive, he duly paid over; but it does not appear, as to this specific fund, that he ever did receive it."

The answer of claimant to this was shortly, as follows:

"The Court of Claims has already found the fact as to which we desire its certificate. If it had not been satisfied of it, that Court could not have given us judgment.

"The defect is in the *form* of the finding. The Court of Claims may have thought (and we have no doubt did think) that the fact of our money being debited to Holabird in his accounts appeared *both* by presumption of law (rebuttable, but not in fact rebutted) and by circumstantial evidence.

"Neither does that Court SAY that there is no evidence that the Chief Quartermaster debited himself in his accounts with the proceeds of our sugar and molasses. The finding says, however, that the fact does not 'appear SPECIFICALLY.' What does that expression mean? We suppose it means simply that the evidence to that fact was not direct and positive. The Assistant Attorney General, however, who is certainly a most able lawyer, contends that the expression 'it does not appear SPECIFICALLY' means that there was *no* evidence to the fact. The object of the order is to ascertain whether or not the Court of Claims, sitting as a jury, are satisfied as a matter of fact, and by the evidence, that our money is debited to Holabird in his accounts, and to have that Court reform the form of their

previous finding so that this Court will not have to listen to arguments endeavoring to show, that when they say a fact does not 'appear *specifically*,' they mean it does not appear *at all*."

This Court finally denied the motion without stating any reasons.

Obviously, the only question now in the case is whether the finding is sufficient on the point of the presence in the Treasury, of the net proceeds of claimant's sugar and molasses. And this itself depends upon the anterior question, whether the findings are sufficient as to the reception of these net proceeds by Holabird, the Quartermaster at New Orleans, as a part of the $33,796.02 received by him in 1863 as the net proceeds of sales in New Orleans, in and subsequent to February of that year, of sugar and molasses. If the net proceeds of claimant's sugar and molasses did constitute a part of that sum, then there can be no question of their being in the Treasury; for the finding is positive that "for this amount the chief quartermaster accounted on the final settlement of his accounts, and the same was credited by the Secretary of the Treasury, to the abandoned and captured property fund in the Treasury."

It is of this anterior fact, viz: the reception of our net proceeds by the Chief Quartermaster, that the Court of Claims say: "It does not appear specifically." This, as we have already stated, is claimed by the appellant to mean that there is no evidence of it, and that it is inferred only by way of presumption of law. The Court of Claims having delivered no opinion in the case, the question how they became satisfied of this anterior, subsidiary, *probative*, fact, (the reception of our net proceeds by the Quartermaster,) can only be judged of from the face of their findings. No indication on the point can be collected from the allowance by the Court of claimant's request to find. (Rec., 6:)

"That it does not appear what became of the fund resulting from the said sale of claimant's sugar and molasses, unless the same was paid over to the Chief Quartermaster of the Department of the Gulf, in pursuance of said order of Gen. Banks, and was included in said sum of $33,796.02."

The Court found the fact as requested, because it was true, and because claimant's counsel asked it. Claimant's counsel never supposed the finding essential; he asked it merely "to make that *clearer* which was clear enough before." It was an act of abundant caution, for it was reasonably certain from the findings of fact already drawn up by the Court itself, and already filed, that the conclusion of law would be in claimant's favor.

It is true the fact of the presence of our money in the Treasury, is not found *as a fact* by the Court of Claims. If it had been so found, the United States could have had no pretext for taking an appeal. The Court, however, must have been satisfied of the fact, or they could not have given judgment for the claimant. For the fact is a jurisdictional one in cases for proceeds of captured property. Is the finding, then, radically defective because of the failure to find this jurisdictional fact, formally *as a fact?*

If this defect of form was a really serious defect, the obvious means of having the defect cured was to remand the record to the Court of Claims with directions to certify whether they found the fact *as a fact.* But the Supreme Court denied our motion without stating any reasons. Hence, we see reason to suppose the Court of Claims is justified in its views announced in Ross *vs.* United States, 12 Court Claims Report, 571, as follows:

"Notwithstanding the frequency with which circumstantial facts have been termed evidence, there often is a debatable ground of circumstantial facts over which both *jury* and *court* must walk, the one to reach their ultimate conclusion of *fact*, and the other to apply intelligently *its conclusion of law.* In such cases the jury must set forth in their verdict

On the record to say, that counsel asked the [illegible] finding but was refused by the Supreme Court

the circumstantial facts which they have deduced from the evidence, and they must also continue their work of deduction until there is nothing left for them to pass upon. Their final deductions may assume the *form* of legal conclusions, but they will nevertheless be *of the nature of fact*, whatever be their form. In like manner the Court will go over the same circumstantial facts and deduce its conclusion, which, however closely it may resemble the conclusion of the jury, will be a conclusion of law."

The Court of Claims cites no authorities in support of this theory, and our own research into the decisions in this country and England upon the sufficiency of special verdicts has resulted in finding nothing worth quoting as applicable to this present case, and in the conviction that the authorities are in a hopeless maze of confusion and contradiction, as far as any application to findings of the Court of Claims is concerned. The form of special verdicts in England seems to be a matter arranged between the attorneys and counsel on the opposite sides. In this country special verdicts seem to be almost unknown except in the United States Circuit Courts, when the parties consent to dispense with a jury, and even these *are rare*. The Court of Claims is the only *Court* in this country which has exclusive and final jurisdiction over all questions of fact, and as to whose conclusions of fact no other court has a right to inquire into the evidence by which they are arrived at. It is a Court with a jurisdiction entirely *sui generis*.

If the Court of Claims had declared in its findings, in this case, in the form of a finding of *fact*, that our net proceeds are in the Treasury, the Supreme Court would have been powerless to dispute the finding. But this fact is not found formally as a fact. It is merely deduced in the form of a legal conclusion, *of the nature of fact*, from the circumstantial facts set out in the findings. Apparently, the question now presented to the Supreme Court is whether or not it is a legitimate presumption of law, (from the circumstantial

facts set out in the findings,) that our net proceeds are in the Treasury. And we must admit, that if such a presumption of law is legitimate, it is so as a presumption that was in its nature disputable, but was not in fact rebutted, as the Court of Claims shows by its finding made at the request of claimant. It is plain enough that the Court of Claims put its finding of this fact into the shape of a conclusion of law, in order that the Supreme Court might be left at liberty to decide whether the presumption of law was legitimately deducible from the circumstantial facts stated in the findings.

This was clearly an act of deference to this Court. If the Supreme Court accepts the homage, and considers the finding in such form not binding upon it, as would have been a finding of the same fact, *as a fact*, why then we must discuss the question whether there is a legitimate presumption of law that our net proceeds are in the Treasury. And this we propose to do without any citation of decisions, about presumptions that judgments are correct, or about verdicts being favored, etc.

We say, then, that the findings are sufficient under the rule in Crussell's case, which was a far weaker case than this; and that they are not amenable to the reproach thrown by the opinion in the Ross case (92 U. S., 281) upon the findings therein of "piling inference upon inference and presumption upon presumption;" we say the fact of our money being in the Treasury is a fair and legitimate inference of fact, and likewise a legitimate conclusion and presumption of law, from the circumstantial facts found; that the Court of Claims reached the conclusion in both ways, and that this Court may well reach the same conclusion as matter of law.

The only necessary fact not positively found as a fact in the findings, and the only one not proven by direct evidence, is the fact of our net proceeds forming a part of the $33,796.02 received by the quartermaster as net proceeds of sales in New Orleans (and subsequent to the sale of our property) of sugar and molasses. It is positively found

that the quartermaster did receive that sum, and that it is in the Treasury.

But as to the receipt of our money by Holabird, the findings say "it does not appear specifically."

The receipt of our money by Holabird is not, of course, an ultimate fact, but it is, in this particular case, a necessary fact, which being arrived at, the essential ultimate fact of our money being in the Treasury, follows by direct evidence and positive finding as a fact.

It seems clear to us that the declaration in the finding, that this intermediate, necessary fact "does not appear *specifically*," is a sort of "negative pregnant," and means, indubitably, that it *does* appear, but not by *direct evidence*.

This fact, however, is inferred from other facts, all of which are proved by direct evidence and positively found.

Thus, it is positively found that our sugar and molasses were seized by the military in Louisiana, in December, 1862; that they were delivered to the Sequestration Commission at New Orleans; that while in the possession of the commission the latter was directed by a general military order to sell it, and pay the proceeds to the chief quartermaster; that thereupon the commission did sell the sugar and molasses (February 4, 1863;) that the net proceeds were $4,362.23; and that subsequently, and during the same year, this chief quartermaster received $33,796.02 as net proceeds of sales in that year, at New Orleans, of sugar and molasses. From all these facts, directly proved and positively found, the Court of Claims inferred the fact that our net proceeds were a part of the $33,796.02. By stating that this fact did not "appear specifically," they showed that it was deduced from the other circumstantial facts.

This fact being thus established, the court went on to find positively that the $33,796.02, consisting in part of our money, are in the Treasury.

Then, as their conclusion of law, (Rec., 5,) and the only

one, they find that the claimant is entitled to recover $4,362.23.

There is nothing to show that the Court made any inference merely and *solely* as matter of law; that in inferring the fact of our money being received by Holabird, it allowed its judgment as a jury to be subjugated by any supposed rule of law, or presumption of law, whatever. There is nothing to show that the Court put itself in the position of a jury who reach a conclusion of fact, under instructions from the judge that the law *allows* them to presume this, or *compels* them to presume that. Very different was the condition of the Ross case when it came to the Supreme Court, as clearly appears in the opinion of the Court of Claims, which shows that that court acted SOLELY upon what it called "the legal presumption established by the Supreme Court in Crussell's case." (14 Wall., 1.)

The opinion, by Nott., J., (10 Court of Claims, 425,) says:

"The facts in this case are: First, the capture of the claimant's cotton at Rome; second, a shipment of all cotton captured at the time and place upon a railway in the possession of and operated by the military authorities; third, the arrival of cotton from that vicinity in Nashville, and its transfer from the Quartermaster Department to the agents of the Treasury; fourth, a sale of cotton thus transferred and an unclaimed fund in the Treasury. We think *these facts entitle the claimant to the benefit of the legal presumption established by the Supreme Court in Crussell's case.*"

As to these findings your Honors said: (U. S. *vs.* Ross, 92 U. S., 282.)

"Certain facts have been found, and from them it was inferred, as *matter of law*, that *other* facts existed; and upon these [*other*] facts *thus* inferred the court gave judgment."

Page 283:

"Such were the facts found; and from them the Court deduced, not as a conclusion of fact, *but as a presumption of law*, that," etc. "It is obvious that this presumption could

have been made only by piling inference upon inference, and presumption upon presumption." "These seem to us to be nothing more than conjectures. They are not legitimate inferences even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever [page 284] circumstantial evidence is relied upon to prove a fact, the circumstances must be *proved*, and not themselves presumed." "The Court of Claims thought the facts found by them entitled the claimant to the legal presumption said by this Court to exist in Crussell's case, 14 Wall, 1; and therefore determined, as a *conclusion of law*, that the cotton taken from the claimant was a part of that transmitted to Nashville, and turned over to the Treasury agent and sold. *We think Crussell's case does not justify such a conclusion.*"

Page 285:

"The language of the opinion in Crussell's case would perhaps mislead, were it not *read in connection with the findings of facts.*"

The opinion then goes on to say that the presumption of law in the Crussell case was only confirmatory of what had been proved by evidence, viz: that *some part* of the claimant's 73 bales of cotton reached Cincinnati and had been sold there:

"The question therefore whether the military officer who shipped the large quantity had shipped with it the cotton of the plaintiff, was not left to depend upon the presumption that he had done his duty. There was distinct and independent proof of it in the fact that *some* of plaintiff's cotton had reached Cincinnati, and had been sold there. The presumption was only confirmatory of what had been proved by evidence, and in confirmation of that proof it might be invoked. This is all that can be deduced from the opinion of the Court, as delivered by the chief justice."

So then, the Ross opinion in this Court declares that the presumptions of law alluded to in the Crussell opinion were properly invoked in the latter case in confirmation of what had been proved in evidence. But what was it that had been proved by direct evidence in the Crussell case? Why merely that *some* of claimant's cotton had been identified in Cincinnati. Or, as the Crussell opinion (14 Wall, 1) says: "It is shown that in the month of December, 1864, there was a sale of cotton at Cincinnati, and *sundry* bales of cotton marked with the claimant's mark were sold."

But there was no identification of the rest of the cotton, beyond the "*sundry bales.*"

There was no *direct* evidence as to the rest of the cotton.

The Court of Claims however had allowed for 73 bales, and the judgment was affirmed.

And accordingly the Ross opinion, says: (92 U. S., p, 282.)

"We do not say that the evidence must be direct. It must however, be such as the law recognizes to be a legitimate medium of proof; and the burden of proof rests upon the claimant who asserts the connection."

It appears then, that the Ross opinion approves the application of the legal presumptions in the Crussell case, in confirmation of what has been shown by indirect evidence, and even in aid of an inference drawn in regard to 73 bales of cotton from what had been proved as to "sundry bales."

We respectfully put it to this Court whether the inference in the Crussell case as to the *rest* of the cotton, beyond the "sundry bales" was a whit more legitimate and reasonable than the inference in Pugh's case of the reception of our money by Holabird. And whether sufficient facts were not directly proved and positively found in this case to justify the application of the legal presumption that the Sequestration Commission did its duty and obeyed General

Order No. 8, by paying over the money to the Chief Quartermaster?

The findings show that Pugh traced his property, and the whole of it to the very sale. After the sale both he and the Government ceased to have any interest in the specific sugar and molasses. Pugh's claim was transferred to the net proceeds. It could not aid him to show where the specific property went after the sale. He has traced every hogshead of sugar and barrel of molasses specifically, up to the moment when he ceased to have any claim upon them, and when his claim was transferred to a net sum of money. Money has no ear marks and cannot be specifically traced. Of course there was no *impossibility* in *the nature of things* that the exact sum of our net proceeds *might* have been put by the Sequestration Commission into the hands of a messenger with an express statement that it was the proceeds of Pugh's property, and that the messenger *might* have delivered it to the Quartermaster with the same express statement; that this messenger *might* have survived the war, *might* have remembered the facts and testified to them. But no party can be required to furnish the best proof that *might* have been possible in the nature of things, and the Court of Claims very well knows by long experience that the actual possibility of any such evidence as above imagined is rankly improbable.

That Court sits in part as a jury, but its conclusion upon evidence have a very different weight from those of an ordinary jury. They are learned lawyers, most of them have filled other distinguished positions; they are surrounded by evidences of what were the habit and spirit of the Government's functionaries, military and civil, in all parts of the country during the war. No other body of men have this peculiar experience, and their opinion upon a matter of fact within their peculiar jurisdiction, is, and ought to be considered, almost infallible. They know better than any one else, what degree and quantity of evidence it is reasonable

to demand in a given case, and where it is reasonable to suppose that direct, abundant and positive evidence is possible, they exact it fully. For instance, the fact of the claimant's ownership of property seized, is a matter within his own peculiar knowledge, and they make him prove it in the most direct and positive way. They do not allow him to rest upon declarations by Goverment functionaries made in the course of their service that the property when seized belonged to so and so.

But when, as in this case, the only debatable question is whether a Sequestration Commission has paid over, as ordered, funds in its hands to a Quartermaster, the Court of Claims knows that the fact is not within the claimant's means of positive proof and does not require it of him. It allows him the benefit of the presumption, established in law, and always probably true in fact, that officers have obeyed the order of their Department Commander, especially when they are acting at his headquarters, immediately under his eye. That is the usual course of things, and the fact that it is so, is the very reason why the presumption has become established as a legal one. Certainly the presumption is not conclusive. It may be rebutted, but it must be rebutted by the defendant. If any evidence to contradict the presumption exists, "it must," (as this Court said in United States *vs.* Crussell, 14 Wall., 1,) "be contained in the books "of the Treasury Department, and these are under the "control of the defendant."

Now here, in the present case, *if* our money did not go to Holabird, there must be evidence in the War or Treasury Department to *show* that it did not.

If no such evidence exists, it must be because our money *did* go to Holabird.

But the proof that it *was* paid to the quartermaster cannot be made positive by the *claimant*, because, (as the Court of Claims well knows,) the immediately obvious and proper vehicles of proof, viz., the quartermaster's accounts, were

not kept with a view to responsibility to individuals, nor with any concern to facilitate possible claimants by stating *whose* cotton it was or *whose* sugar, molasses, or other property it was, of which they acknowledge the receipt of the proceeds. Very likely there exist in the Departments stacks of books, an examination all through which, would show to a certainty what became of every cent of money that came to the Sequestration Commission; but if so, claimants cannot know it; they have not access to them and cannot describe them so as to draw up a call for them definite enough and limited enough to be allowed by the Court of Claims. That Court would certainly not allow a call for *all* books and papers relating to captured property. The Government does not find it to its account to throw open to the Court of Claims, broadly and freely, all its papers, books, accounts, &c., relating to captured and abandoned property. The law does not require it, but only requires the Departments, (Rev. Stat., 1076) to transmit information or papers when, in their opinion, it will not be "injurious to the public interest." If all the means of information in the Departments were frankly thrown open to the Court of Claims, they would, in a measure, be likewise open to the public, and this would attract a swarm of claimants. But the Government is not at all remiss in bringing out secret evidence for the defence. Thus your honors will recollect that in the case of Moore, (91 U. S., 270,) the defendant produced a bill of sale by the claimant to the Confederate Government of the very property for which he claimed; and proved the signature by comparison with his admitted signature to another paper in the case. There is no particle of reason to doubt that if, in this case, there was any evidence to contradict the probable fact, and rebut the presumption that our money did go to the quartermaster, it would have been brought out years ago. If there is such evidence, the United States may use it on application to the Court of Claims for a new trial.

As yet the defendant has not filed a scrap of evidence.

The Court of Claims, enlightened by its abundant experience, had applied the presumptions expressed in Crussell's case, (14 Wall., 1,) long before the Supreme Court rendered its opinion therein. (See Ake Henry's case, 6 Ct. Cl'ms Rep., 389.)

After the Crussell opinion it continued to do so, where necessary, with general acquiescence, until your honors decided, in the Ross case, that they had carried the legal presumptions recognized in the Crussell case too far. In the Ross case, however, the Court of Claims expressly admitted and declared in its opinion that the conclusion of the money being in the Treasury was arrived at by means of the "legal presumption established by the Supreme Court in Crussell's case." Its opinion (10 Ct. Cl'ms Rep., 425) says, after stating the facts formally found: "We think these facts entitle the claimant to the benefit of the legal presumption established by the Supreme Court in Crussell's case." And in the opinion on the *second* trial of the Ross case it is said, (12 Ct. Cl's Rep., 576, top of page,) "But it is due to a just comprehension of the question to add, that the [first] finding in this case was predicated upon this supposed *presumption of law;* and that when the presumption fell, the finding necessarily fell with it."

In the present case, however, there is nothing to show that the Court of Claims proceeded merely and solely upon these legal presumptions. If they did, it was not a hair's breadth further than is approved in the Ross opinion, (92 U. S., 281.)

Not only is there nothing to show that they *did* proceed merely upon legal presumptions, as in the Ross case, but the findings show clearly that they did not. The findings state that the fact of the Quartermaster having received the money "does not appear specifically," and then proceed to state the facts which prove it indirectly. The Court did not rely, because in the case it was not necessary to rely,

merely upon any legal presumption. If they relied at all upon any legal presumption, it was only in aid and confirmation of what had been shown in evidence, and this was perfectly proper according to the Ross opinion.

After the first judgment in the Ross case was reversed, the Court of Claims evidently was inclined to suppose that the presumptions of law stated in the Crussell opinion were overruled by the Supreme Court in the Ross case. This appears from the action of the Court as expressed in head VI of the syllabus of the opinion of the Court of Claims on the *second* trial of the Ross case, which reads as follows:

VI. "The ultimate fact that a party's cotton was captured, and the proceeds reached the Treasury, may be drawn by this Court, setting as a jury, from circumstantial facts established by the evidence, out of which *no presumption of law arises.*"

Now we think that in the present case the Court of Claims did exactly what this head of their syllabus shows they did on the second trial of Ross' case. We see nothing to indicate, and we do not believe that they consciously proceeded upon any legal presumption whatever. They may have proceeded upon an inference of fact, so usually leading to the truth, that it has been dignified into a presumption of law, though a rebuttable one. But they drew the inference as a *matter of probable fact, and not as a matter of law.* They stated the conclusion of fact in the form of the conclusion of law, but we believe they arrived at it by way of inference of fact.

However the fact may be as to all this, we submit that this Court, if necessary, will find abundant foundation in the findings, for a proper application *by itself* of the legal presumptions laid down in the Crussell and Ross cases.

As we said just now, the Court of Claims was inclined to suppose that the Ross opinion in the Supreme Court overruled the doctrine of the Crussell case, and established the

rule that the burden of proof that proceeds of captured property are in the Treasury, falls totally and all through the case upon the claimant, and consequently in the second trial of the Ross case, no presumptions at all were indulged in as a *matter of law*. The same idea appears in the syllabus by the Court of Claims reporters of the opinion of the *Supreme Court* in *United States* vs. *Ross*. That syllabus reads: (11 Court of Claims, Rep., 344.)

"V. The decision of the Supreme Court in *Crussell's* case (7 Court of Claims Rep., 276) examined and explained, and the doctrine of the burden of proof being on the Government to rebut certain presumptions in captured property cases apparently overruled."

It seems to us, and we say it with deference, that this is a great exaggeration of the effect of the Supreme Court's opinion in the Ross case. It is true this Court said:
(92 U. S. p. 282.)

"There must be evidence connecting the receipt of it, [the captured property] by the Treasury agent, with the payment of the proceeds of sale of that identical property into the Treasury. We do not say that the evidence must be direct. It must however, be such as the law recognizes to be a legitimate medium of proof; *and the burden of proof rests upon the claimant who asserts the connection.*"

Now this last clause, which we have italicised, is probably the cause of what we suppose to be an erroneous construction of the Ross opinion. We may say of this clause, as the Ross opinion itself says of that in Crussell's case, that it "would perhaps mislead were it not read in connection with the findings of fact." (92 U. S., 285.)

No intention of overruling any doctrine in the Crussell case is expressed.

Nothing to that effect is stated in the syllabus to the report of the Ross case in the Supreme Court Reports. The Crussell opinion held that under the particular facts of that

case, the presumption that officers did their duty was effective, and that there was nothing in the case to repel the presumption, and that if any evidence to that effect existed it must be contained in the books of the Treasury Department, and these were under the control of the defendant. Three justices dissented, on the ground that the opinion threw the burden of proof on the point upon the United States.

The argument of counsel for Crussell, as reported in 14 Wall., p. 4, proceeded entirely upon the probability in fact, and presumption of law, that the officers concerned had done their duty. The Ross opinion of this Court, reviewing the Crussell case, does not deny the propriety of applying the presumption of law to the particular facts of the latter case, but says, (92 U. S., p. 285:)

"The question, therefore, whether the military officer who shipped the large quantity had shipped with it the cotton of the plaintiff, [Crussell,] was not left to depend upon the presumption that he had done his duty. There was distinct and independent proof of it in the fact that *some* of the plaintiff's cotton had reached Cincinnati, and had been sold there. The presumption was only confirmatory of what had been proved by evidence, and in confirmation of that proof it might be invoked. This is all that can fairly be deduced from the opinion of the Court as delivered by the Chief Justice. No more need be said of the present case. It is not found as a fact that the identical cotton captured from the plaintiff *ever came into the hands of a Treasury agent, or that it was sold*, and that the proceeds were paid into the Treasury; *and the presumption of law* adopted by the Court that the cotton was a part of that transmitted and sold, was unwarranted."

The difference between the two cases of Crussell and Ross was, that in the latter the essential ultimate fact was reached solely and avowedly (see opinion on first trial, 10 Ct. Cl'ms. Rep., 425, and 12 Ct. Cl'ms. Rep., 576, on the second trial,) by means of *legal presumptions*, whereas in the

Crussell case, the legal presumptions were only applied in aid and confirmation of *evidence*. This evidence was, as to "sundry bales" *direct*, that they were identified in Cincinnati by marks. As to the rest of the 73 bales, this evidence must have consisted, to speak with sharp analysis, merely in an *inference of fact*, that as "sundry bales" were sold at Cincinnati, the rest of the 73 bales must have been sold there, too. But was there any *specific evidence* whether documentary or by testimony, that *after the sale the proceeds of any of this identical cotton, even of the "sundry bales" were paid into the Treasury?* Did it appear specifically "that the proceeds of the identical 73 bales out of a much larger amount" (Vide Ross opinion, 92 U. S., 285,) were paid over? We find not the slightest indication that there was the least evidence, documentary or otherwise, to that effect, though we have searched for it through the Court of Claims Opinion, in 4 Court Claims Report, 583, the Supreme Court Opinion in 14 Wall., 1, and the review thereof in Ross *vs.* U. S., page 281, 92 U. S., and in all the findings, including the amended ones, sent up by consent of parties; (about three printed pages of findings in all. See Vol. 2, Records of Cases in the Supreme Court, December Term, 1871, at the beginning of the volume.)

Much of the findings sent up by consent, was testimony. The fact that after the sale the proceeds of the identical cotton *were paid over as the law directed*, must have been presumed as a matter of law; or as a presumption of law confirming an inference of fact, viz: the inference that as the Government admitted the receipt of proceeds of a "much larger" amount of cotton sold at Cincinnati, these proceeds must have consisted in part of the proceeds of Crussell's cotton. A similar presumption we ask this Court to apply with respect to the net proceeds of our sugar and molasses after the sale. In Crussell's case there could have been no question if any Government books had stated *whose* cotton it was, of which the Government admitted it had received

the proceeds from the sale in Cincinnati. So, in the present case, there would be no question for the appellant to argue about if the Quartermaster had kept a record of the *ownership* of the sugar and molasses, for the proceeds of which he accounted. But no such record of ownership was kept, and that is why the fact of his receipt of it "does not appear specifically." This word "specifically" means "expressly," "by direct and positive evidence." The corresponding adjective is used in the same sense by Mr. Wallace, in his syllabus of the Crussell Opinion, which reads as follows: (14 Wall., 1.)

"A judgment of the Court of Claims giving a loyal owner the proceeds of cotton seized under the Abandoned and Captured Property Act, affirmed; the case tending generally, though not in the most SPECIFIC manner, to show that the cotton had been sold and its proceeds paid into the Treasury; and an opposite conclusion being irreconcilable with the presumption that the military and fiscal officers of the United States had done their official duty."

Here the phrase "not in the most *specific* manner" clearly means "not by the most direct and positive evidence."

The very word "SPECIFICALLY" occurs in Rule V, of this Court, regulating appeals from the Court of Claims, (9, Wall.) Rule V;

"In all such cases either party on or before the hearing of the cause, may submit to the Court a written request to find *specifically* as to the matter of fact which such party may deem material to the judgment in the case, and if the Court fails or refuses to find in accordance with such prayer then such prayer and refusal shall be made a part of the record, certified on the appeal to this Court."

We think then the Court of Claims was not correct in its first understanding of the Ross opinion, and that Court upon comparing that opinion with that in the Intermingled Cotton Case of Raymond and others, (92 U. S., 661,) seems to have so concluded. In a note (11 Ct., Claims, Rep.,

344,) to a report of this Court's opinion in the Ross case, it is said by the reporters.

"If the Supreme Court had not decided another case, (Raymond's *post*) at the same term, and indeed on the same day, it might be inferred that the intention in this case was to overturn what has been the settled doctrine of the Court of Claims in 'cotton cases' ever since the decision of the Supreme Court in *Crussell's case*. But when the findings of these two cases (this and Raymond's) are compared, it will be seen that they differ chiefly in form, both resting on inference; this one leaving the inference in the shape of a *presumption of law*, the other placing it in the guise of a *conclusion* of *fact*." * * * * "The general legal conclusion to be drawn from both cases seems to be this: on the circumstantial evidence (or facts) of either case, no *presumption of law* would arise; but from the same circumstantial facts a jury might draw a conclusion favorable to the plaintiff, and it would not be set aside for the insufficiency of the evidence."

And again, the Court of Claims says in its opinion on the second trial of the Ross case (12 Court of Claims, Rep. 576 at the bottom of the page:)

"But while the decision of the Supreme Court in this case reverses the common understanding of Crussell's case, and does away with the supposed presumption of law which in effect shifted the burden of proof to the defendants, the case of Raymond, (11 Court of Claims R., 477,) decided by the same Court, on the same day, shows that the decision in this case was intended to be confined to those presumptions which are made by *courts* from evidence, as distinguished from those conclusions or inferences which may be drawn from the same evidence by *juries*."

Whether this last construction be correct, the Supreme Court has not yet declared. The Chief Justice of the Court of Claims appears (12 Court of Claims R., 579) to have only "agreed in the conclusion that the claimant should recover."

This construction is supposed to be the proper result of

a comparison, side by side, of the Ross and Raymond decisions. But it seems to us that looking at the Ross opinion alone, it is true to say that it makes no decision except as to presumptions drawn purely and entirely as *matter of law* since all the presumptions there dealt with were distinctly and *avowedly* such.

We do not understand the Ross decision of the Supreme Court to hold that a presumption as matter of law may not be based upon an inference of fact, drawn from another fact shown by direct or indirect evidence, nor that the burden of proof may not be *shifted* by evidence, or even by a fair, legitimate inference of fact, or perhaps even by a legal presumption based upon a proper inference of fact.

As we supposed all these questions might be avoided in the present case by a slight change in the *form* of the finding, we moved this Court last term, to remand the record that the responsibility of settling the question of fact about what became of our net proceeds might be thrown upon the Court of Claims, as a jury. This would have been as if the judge, upon a jury coming in with a verdict defective in form and in certainty, had sent them back to reform their verdict and make its meaning certain.

This Court, however, denied the motion, without giving any reasons, and of course, it would be idle to speculate about them. We hope, however, it was because at a preliminary glance at the findings, they appeared to be, as we submit that they are, entirely sufficient.

We add a word about the finding made at request of appellant's counsel. (Rec., 7, bottom of page.) It can have no possible bearing upon the case, for of what consequence is it that the commission refused to return a portion of the proceeds to a lady who had no right thereto? If Mr. Pugh had been dead his wife would have been entitled to one-half by the Louisiana law of community, but he was living, and is still living. And if appellant's counsel in the lower court, had smuggled the whole of the evidence, instead of only a

portion thereof, into the record before this Court, it would appear that the commission refused to restore the proceeds to her because (they said) the sugar and molasses belonged not to her, but her husband, and they did not understand him to be loyal.

It is evident that this finding had no effect upon the judgment of the Court of Claims. It does not appear what the date of Mrs. Pugh's application was, nor what the date of the decision against her was. That decision may have been months anterior to the date of the letter announcing it. The notification to her was a mere piece of courtesy to a lady.

We append a copy of the opinion of the Court of Claims upon the second trial of the case of Ross *vs.* The United States, as it contains the only elaborate discussion known to us, of the perplexing question, what may properly be expressed in a finding of fact *by the Court of Claims* "in the *nature* of a special verdict," and of the proper form thereof.

Respectfully submitted,

EDWARD JANIN,
Of Counsel for Appellee.

APPENDIX.

COURT OF CLAIMS.

GEORGE W. ROSS *vs.* THE UNITED STATES.

NOTT, J., delivered the opinion of the Court:

The means provided for reviewing the decisions of this Court consist entirely of "a finding of the facts established by the evidence in the nature of a special verdict, but not the evidence establishing them." (Supreme Court, Rule 1, regulating appeals from the Court of Claims.) From the first appeals that went up to the Supreme Court, (*Adams's and Other Motions*, 7 C. Cls. R., 11; *Clark's Case*, id., 32,) down to the last term, (*Paymaster Clark's Case*, id.,) the question which can or cannot be reviewed by special verdict, and the matters which should or should not be set forth in the findings, have furnished a vexatious subject of dispute and doubt. It now seems desirable to clear away this obscurity, if possible, and ascertain what questions must be excluded from the consideration of the appellate Court, if special verdict be the only means for reviewing a decision.

Special verdict is probably as old as trial by jury. As early as the reign of Edward I, (2 Westm., 13 Edw. I, c. 30) it was a subject of statutory enactment, being made the right of the jury, lest they should be attainted for rendering a false verdict in cases where they were doubtful of the law. In modern practice it is ordinarily a matter of mutual arrangement, where the facts are simple and the questions of law novel or obscure. Of late years it has well-nigh gone out of use in this country, having given place to an agreed statement of the case, or to a general verdict subject to the opinion of the Court; and there are many American lawyers of large practice who have never seen a special verdict rendered. Though easily defined to be a statement of facts free from evidence on the one hand, and from argu-

ment or conclusions of law on the other, (2 Roll. Abr., 693, S. &. T.,) the practical application of these conditions frequently requires the same precise intellectual analysis of a case that was formerly required in the refinements of special pleading. In an early case the jury find of a farmer that, in addition to his occupation of farming " he likewise bought of other persons several great quantities of potatoes with intention to sell for gain, which he publicly did in several markets, and that if this makes him a trader he committed an act of bankruptcy." The judges are divided on the sufficiency of this verdict, some thinking that it presents the legal questions involved, others holding that the verdict must set out the quantity in which he traded, so that the Court can judge by the extent as to whether he was a trader within the intent of a bankrupt act. (*Mayo* vs. *Archer*, Strange R., 513.) In a modern case the finding is, that a builder did not construct a house in the manner prescribed by his contract, but that the defendant " took possession " " without objection at the time, and appropriaated the same to his own use." Here it is plain that every fact directly "established by the evidence," and " not the evidence establishing them," is thus set forth in the verdict; yet two very able judges concur in holding the finding bad, because it is not found whether performance of the conditions was waived by the defendant. (Justices Harris and Comstock in *Smith* vs. *Brady*, 17 N. Y. R., 173.) So where a verdict sets forth facts which imply an executor's assent to the vesting of a legacy, we find that Chief Justice Marshall holds that " although in the opinion of the Court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the Court could not intend it." (*Barnes* vs. *Williams*, 11 Wheat R., 415.) In most cases " reasonable time " is a question of law, yet where a special verdict finds the specific time and nothing more, Chief Justice Marshall holds it to be fatally defective. (*Chesapeake Insurance Company* vs. *Starke*, 6 Cr. R., 268.)

Cases, too, are to be found which are directly opposed to each other, though the different Courts are applying the same rule, and professing to be guided by the same principles. In the English case of *Monkhouse* vs. *Hay*, (8 Price R., 256,) the verdict sets forth that a bankrupt had posession of a ship and appointed the captain and exercised all acts of

ownership, but fails to find that he was the apparent owner. The Exchequer Chamber, per Chief Justice Dallas, holds that "sufficient facts are stated on this record to refer to the Court the consideration of the question of law, whether the trader had such an apparent ownership as comes within the mischief intended to be remedied by the statute." In the American case of *Henderson* vs. *Allen*, (1 Hen. & Mun. R., 235,) the verdict sets forth that the defendant brought the plaintiffs as slaves into Virginia, and that he detained them there nine months, when he was forbidden by an order of a Court to remove them, and they thus remained in the defendant's possession in Virginia seven months more, but fails to find that they were detained in the State twelve months by compulsion of the defendant, which would have rendered them free. The court of appeals holds this verdict "uncertain and insufficient," as setting forth the evidence and not the fact, though manifestly the only question of law was whether the detention under the order of a Court should be deemed involuntary and not compulsion on the part of the defendant.

Conversely, if the jury in some of these cases had omitted from their verdict what the courts call evidence, and had contented themselves with finding nothing more than the ultimate fact, for the omission of which their verdicts were held bad, it is manifest that no question whatever would have been presented by the verdict for the Court to pass upon, and the jury would in effect have determined the law as well as the fact. If, for instance, in the case first cited, the jury had found that the farmer who likewise dealt in potatoes was or was not a trader, and had found nothing more, that would have disposed of the case; or if, in the case of the builder, the jury had found that the defendant waived the conditions of the contract, and had found nothing more, there would have been nothing left for a Court to decide. Notwithstanding the frequency with which circumstantial facts have been termed evidence, there often is a debatable ground of circumstantial fact over which both jury and court must walk, the one to reach their ultimate conclusion of fact, and the other to apply intelligently its conclusion of law. In such cases the jury must set forth in their verdict the circumstantial facts which they have deduced from the evidence; and they must also continue their work of deduction until there is nothing left for them

to pass upon. Their final deductions may indeed assume the form of legal conclusions, but they will nevertheless be of the nature of fact whatever be their form. In like manner the court will go over the same circumstantial facts and deduce its conclusion, which however closely it may resemble the conclusion of the jury, will be a conclusion of law.

Again, the definition of a special verdict and the rule of the Supreme Court alike require that the finding shall be free from evidence. But this cannot be taken literally. A deed, a will, a written contract, a record is documentary evidence; yet such writings, when they involve judicial construction, must necessarily be set out in the verdict, that the court may have them before it to construe. *Lane's Case*, (7 C. Cls. R., 97.)

The usual definition of the requisites of a special verdict is therefore faulty and defective, misleading in what it omits, and contradicted by numberless cases in what it says.

A special verdict should set forth all facts established by the evidence, so far as they may be necessary to delineate the rights of the parties and present the questions of law involved in the issue; and it should set forth facts only, as distinguished from evidence, immaterial circumstances, argumentative inferences, or conclusions of law; but it should also set forth such documentary evidence as may be matter for judicial construction; and where the facts established by the evidence are of the nature of circumstantial evidence, the verdict should not stop until the functions of the jury are exhausted, and the ultimate fact which may be deduced from the circumstantial facts is found.

But the more important question is, What matters can and cannot be reviewed through the medium of a special verdict?

It is manifest that all the legal occurrences of a trial cannot be embodied in the verdict. For a verdict, be it general or special, is but the result which a jury have reached—a result and not the means or processes—of the jury, and not of the court. Therefore a broad and clearly-defined distinction can immediately be drawn, viz, that it is only the abstract rights of the parties, irrespective of the evidence, irrespective of the trial, irrespective of all the processes by which they are ascertained, that can be carried to the

appellate court for judicial determination by the means of a special verdict.

In England it is for the most part only these abstract rights, that is to say, the rights which are submitted to litigation as distinguished from those which grow out of the litigation itself, that go up to the appellate courts. Neither writs of error nor special verdicts ever carried up the evidence, and bills of exceptions, which were never used there to the extent that they have been in this country, have recently been abolished. (Judicature Rules, Order 58, Rule 1.) In our American courts there has gradually grown up a practice of virtually retrying a case in an appellate court by means of a voluminous bill of exceptions, and the practice has grown into a mischief which encumbers and delays the administration of justice. A reform to a limited extent has lately been instituted by Congress, (*Acts relating to Territorial courts and cases in admiralty*, 18 Stat. L., pp. 27, 315,) but it was in fact begun by the Supreme Court when the rules regulating appeals from this court were framed. What, then, are the questions of law arising on a trial in this court, which the Supreme court intended should or should not be reviewed by an appeal?

The questions of law that may arise in trials at *nisi prius* may be grouped in five classes: 1. There are questions relating to the admissibility of evidence, and such questions can only be presented to an appellate court by means of a bill of exceptions. 2. There are questions as to whether the evidence is sufficient in law to sustain the verdict; and the consideration of such questions manifestly requires that all of the evidence shall be spread upon the record. 3. There are questions as to whether facts established by evidence, but nevertheless being in themselves nothing more than circumstantial evidence, are sufficient to establish the ultimate fact or final result of a jury's deliberations; and as to these questions we perceive no reason why they cannot be incorporated in and presented by a special verdict. 4. There are questions growing out of the offer of a party to prove a supposed material fact, and the refusal of the court to admit the evidence; and although these cannot be presented by special verdict they may be presented under the rule of the Supreme Court, by a request that the fact be found and the refusal of this court to find it. 5. There are the ultimate conclusions of law, which measure and deter-

mine the rights of the parties, and are always the same whether presented by demurrer, agreed statement, bill of exceptions, or special verdict.

That all questions of law cannot possibly be presented by means of the special verdict of a jury or the findings of a court is most clearly elucidated in the opinions of Mr. Justice Nelson in Arthurs *vs.* Hart, (17 How. R., 6,) and of Mr. Justice Clifford in Suydam *vs.* Williamson, (20 id., 427.) No two opinions of these learned and most experienced judges are more conclusive in demonstration or decided in expression. At the time when the rules regulating appeals from this court were framed, both of those judges were upon the bench and had delivered the opinions referred to. It is therefore, plain that when the Supreme Court deliberately determined that a finding of facts in the nature of a special verdict should be the only means for reviewing a trial in this court, it was intended that those questions of evidence which can only be reviewed by means of a bill of exceptions should be committed absolutely to the judgment and decision of this court.

Notwithstanding the decisive terms of the rule, there has been considerable latitude allowed in practice by both courts. In this court when important questions arose which were decisive of a case, there was a reluctance on the part of the court to make its own decision final; and such questions occasionally inserted in the findings, have been accepted and passed upon by the Supreme Court. In Nelson Anderson's case, (7 C. Cls. R., p. 121,) the question was as to the competency of a witness, and a more preposterous question of law to be thrust into a special verdict could not well be imagined; yet this court stated it in the findings and the Supreme Court passed upon it, holding the witness competent. In Nahum Ward's case, (id., p. 187,) the court omitted to find the essential fact whether certain continental loan certificates were or were not countersigned by a commissioner for the State of Georgia, but stated the substance of the evidence on which the claimant relied; and the Supreme Court examined into and indeed were divided upon the sufficiency and effect of the evidence. In Hamilton Slawson's case, (8 id., 144,) this court found simply the circumstantial facts that the claimant purchased a steamboat after she had been impressed into the Confederate service and a subsequent conversation or agreement between him

and an officer of the United States, yet the Supreme Court did not hesitate to draw as an inference of fact the conclusion that the claimant consented to the vessel's being thus employed, and that the officer was not informed of the true state of affairs when he entered into the agreement to employ the boat. The case is more noticeable that it turned entirely upon the fact of the claimant's consent, and no such consent was found by the verdict. In Moore's case, (11 id., 93,) the only question of law related to the manner in which the signature to a bill of sale had been proved. No fact "established by the evidence" was a subject of contention, and the whole controversy turned on the admissibility of the evidence which did or did not establish the fact of a sale. Nevertheless the Supreme Court did not refuse to consider the appeal, and this question of evidence forms the only subject discussed in its opinion.

But the more recent practice of the Supreme Court has been to maintain the integrity of the rule. Manifestly one court or the other must be the final judge of questions of evidence. If the Supreme Court is to be the judge, then the evidence must go up with the record, and a bill of exceptions be added to the findings of fact. If this court is to be the exclusive judge, then it must assume the responsibility, and recognize the fact that its own action is necessarily final. Hereafter no attempt will be made to send up questions of law which cannot properly be presented by a finding of facts.

The present case also gives rise to another question of some importance concerning the presumptions which arise from the acts and duties of public officers. And first, it may not be improper to remark that this court has never carried the theory of presumption to any such extent as seems to have been supposed. If the evidence were to show that a man fired a gun into a crowd of people, no presumption would arise that some one was actually killed or wounded. But if it were shown that the prisoner loaded his gun and discharged it into the crowd within range, and that at same time some one in the crowd was killed by a bullet which might have been fired from that gun, it would hardly be called piling presumption upon presumption to say that the person in the crowd was killed by the man who discharged the gun, though the bullet was not positively identified. This is the extreme extent to which the doctrine of

presumption has ever been carried by this court in captured property cases. Seizure by an officer has never been held to raise a presumption that the property was forwarded, sold, and the proceeds paid into the Treasury. But where a capture was shown on the one hand, and a fund in the Treasury on the other, derived from property of the same kind captured about the same time, and brought from the same place or vicinity, there it was held that a presumption of law did arise, connecting the apparent cause with the apparent effect, viz, that the claimant's property captured at one end of the line contributed in whole or in part to the fund derived from such property at the other end, and that the burden of proof was on the defendants or the adverse claimants to repel the presumption. (Cone's Case, 8 C. Cls. R., 329.) This doctrine, and to precisely the same extent, was understood by this court, by the law officers of the Government, and by the bar, to have been laid down by the Supreme Court in Crussell's case, (7 C. Cls. R., 276,) and the minority of that court were understood to have held precisely what has recently been laid down by the whole court in this case, (11 C. Cls. R., 343.) If the interpretation now given to the opinion of Chief Justice Chase in Crussell's case is the meaning which the majority of the court then ascribed to that decision, it is well-nigh impossible to understand upon what the minority dissented.

But it is due to a just comprehension of the question to add, that the finding in this case was predicated upon this supposed presumption of law, and that when the presumption fell the finding necessarily fell with it. *The case was one of those before referred to, wherein this court desired to submit to the appellate court the question whether the evidence was sufficient to sustain the verdict.* The finding was as though a special verdict were to state that a person loaded a gun at 10 o'clock and discharged a gun into a crowd at 11, and that some one in the crowd was killed by a bullet about the same time, and were, for want of positive evidence, to omit finding that the prisoner inflicted the wound, leaving the uncertainty of the evidence to be holpen out by a supposed presumption of law. The absolute impossibility of having direct evidence in the case supposed would doubtless relieve a jury from all scruples in finding the ultimate fact, but in the case of a railway train carrying its load from the point of destination direct evidence is possible, and in its absence,

in a somewhat but not precisely similar case, the Chief Justice of the Supreme Court had said that the presumption was "that the Quartermaster at Atlanta forwarded to the officer in charge of military railroad transportation the cotton of the claimant, and that this officer turned over the cotton to the agent at Nashville, by whom it was forwarded to Cincinnati and sold by the supervising agent there;" and that "if any evidence" to repel "this presumption" existed "it must be contained in the books of the Treasury Department, and these are under the control of the defendants." (Crussell's Case, 7 C. Cls. R., 276.) It was therefore thought advisable to so frame the findings that the Supreme Court would be able to pass upon the question whether the presumption spoken of in Crussell's case extended to this.

But while the decision of the Supreme Court in this case reverses the common understanding of Crussell's case, and does away with the supposed presumption of law which in effect shifted the burden of proof to the defendants, the case of *Raymond*, (11 C. Cls. R., 477,) decided by the same court, on the same day, shows that the decision in this case was intended to be confined to those presumptions which are made by courts from evidence as distinguished from those conclusions or inferences which may be drawn from the same evidence by juries. So far as the specific or circumstantial facts were concerned, this case was the stronger of the two. In it it had been found that the claimant's cotton was placed in a warehouse under military control, beside a military railroad; that the warehouse had been emptied; that cotton had gone forward on the road toward Nashville, the great cotton depot of the region, and that cotton had been received there coming from the same region of country by the same road, and belonging to unknown owners. In Raymond's case the cotton was found to have been loaded on unknown vessels (not even shown to have been under military control) at Haines's Bluff, on the Yazoo, and that it was never seen again. But in this case the connecting link was left to legal presumption, while in the other this court found as a fact that the cotton "might, and amid the circumstances of the case naturally would, have gone into the mass at Vicksburgh, and constituted a part of the cotton received by the Treasury agent at that place;" "and upon these facts and presumptions," "though without there being direct proof of the ultimate facts," the court also found

"that the cotton owned by the claimant constituted a part of the cotton received by the Treasury agent at Vicksburg, and contributed to the fund." This conclusion of fact the Supreme Court regarded as sustained by the evidence; that is to say, by the circumstantial facts upon which it was founded.

The difficulties which this court has had to contend with in administering the captured property fund, is illustrated anew in this case. In *Price's Case*, (7 C. Cls. R., 567,) the court bestowed more labor in making up a comprehensive account of the Northern Georgia cotton-funds than probably was ever expended by a court on a fund in equity without the aid of a master or professional accountant. Now, after the lapse of eleven years from the ending of the rebellion, and five years from the account stated in Price's case, a report comes from the Treasury showing, for the first time, that a portion of two funds was paid away by order of the Secretary of the Treasury while the proceeds were yet in the hands of the supervising agent. This remark is not intended as a reflection upon the officers of the Treasury, whose ministerial duties simply require them to send up the specific information from time to time called for by parties. The truth is that the magnitude and intricacy of these captured-property accounts were never duly appreciated, and this court, being left without the power of an ordinary court administering a fund in equity to compel at the outset a complete and intelligible account of the entire fund, has been obliged to deal with such information as from time to time has been laid before it.

We have now reviewed the general account stated in the Price case, making such corrections as subsequent information has suggested; but it is proper to add that the internal-revenue tax and custom-house fees, erroneously deducted from all of the funds, have only been ascertained and restored in the second fund.

The judgment of the court is that the claimants recover the proceeds of seven bales of cotton, at $618.84 per bale, amounting to $4,331.88, and forming a charge on the third fund in the Price case.

DRAKE, Ch. J., agreed in the conclusion that the claimant should recover.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 227.

THE UNITED STATES, APPELLANTS,

Vs.

Walter ~~WILLIAM~~ PUGH, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR CLAIMANT IN ANSWER TO THAT OF APPELLANTS.

EDWARD JANIN,
Of Counsel for Appellee.

Judd & Detweiler, Printers.

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BRIEF FOR CLAIMANT IN ANSWER TO THAT OF APPELLANTS.

The first brief for claimant was prepared and printed in advance of that of appellants; and the latter having now printed their brief, we beg leave to answer it.

Counsel contends in effect, that General Butler's sequestration order being matter of history, this Court judicially knows its tenor; that this order conferred exclusive jurisdiction upon the sequestration commission to determine the question of claimant's loyalty; that loyalty is essential to a recovery of the proceeds of property seized under the order, and that the commission decided the question adversely to claimant:

That "General Order, No. 8, Department of the Gulf," did not require the payment over to the quartermaster of the proceeds of this claimant's sugar and molasses, since, as

appears from the last finding, claimant's wife must have made an application for a release of a portion of those proceeds;

And finally, that the Court of Claims had not jurisdiction because—1st. Though the quartermaster may have accounted to the Treasury Department for those proceeds, and the Secretary have credited them to the captured and abandoned property fund, yet this did not make them a part of that fund. And, 2d. Because the property was seized prior to the passage of the act of March 12, 1863, (12 S. L., 820,) to wit, in December, 1862.

These points as to the jurisdiction appear to us, to be the only ones in the brief of much moment.

They have never been formally passed upon by the Supreme Court, though a number of judgments against the fund have been rendered by the Court of Claims, upon a state of facts similar to those which raise these questions in the present case: the first one as long ago as the December term, 1867. (Barringer's case, 3 Ct. Claims, Rep. 358: Minor's case, 6, 393: Terry's case, 8, 277: Miss Moore's case, 10, 375.)

As to General Butler's order, there is nothing about it in the findings, and we do not see how this Court can judicially know its tenor. But if this Court shall take such cognizance of it, your honors will find that it contains a promise of restoration to loyal owners. But the Amnesty Proclamation of 1868, would seem to be as potent to dispense with proof of loyalty in a suit for proceeds of property captured under an order of General Butler, as of property captured under an act of Congress.

Hence, it would be immaterial if the commission had determined that this claimant was disloyal. But it never did so determine, for he never made a claim before the commission, whether for his property, before the sale, or for its proceeds after the sale, and consequently he never was before that commission.

Counsel for appellants represents the part of General Banks' "Order, No. 8," set out in the findings, (see Findings II and III,) as providing that if any property in the hands of the commission had been claimed, then the proceeds thereof were not to be paid over to the quartermaster. This, however, is a clear distortion of the order, for the provision is, that property that shall have been released or claimed, shall not be *sold*. The order to the commission is, (Finding II, Rec., 5 :)

"To *sell* at public auction all property in its possession that has not been or may not be claimed or released," etc.

But the proceeds of whatever should be sold, were to be paid over to the quartermaster.

And there is not the slightest indication in the record, that any claim, even by claimant's wife, was made to the sugar and molasses while in possession of the commission. Hence the sale *did* take place, February 4th, 1863.

The fact that the sale *was* made is as clear evidence that the sugar and molasses was not *claimed*, as that it had not been released at the date of the sale, or that it was not "required for the use of the army."

It is inferable from the last finding that at some indefinite period *after* the sale Mrs. Pugh asked to have a portion of the proceeds released to her. It does not appear when she made this application, or to whom she made it.

Even if it were assumed, without the least warrant, that her application was made before the proceeds were paid over to the quartermaster, it would not appear that her application could have prevented obedience to the order to pay over. The moment the property was, in fact, *sold*, it became obligatory, under the order, to pay over the proceeds to the quartermaster.

Mrs. Pugh was notified in June, of a decision against her. But it does not appear how long before the month of June the adverse decision was made, nor when she made her application. The sale took place February 4, 1863. It

immediately became the duty of the commission to pay over the proceeds.

For all that appears, Mrs. Pugh may not have made her application to have a portion of the proceeds released to her until some months had passed after the proceeds were in the hands of the quartermaster. If the commission had granted her application for the release of a portion of the proceeds, it might, through the commanding general, have recalled the money, from the quartermaster. But her application was *rejected*.

The notification to her agent took place in June, but the decision may, for all that appears, have been made in February, or March, or April, or May. All the facts and dates were before the Court of Claims. That court considered them of no consequence and made no findings of its own accord, about them, and only because defendants' counsel requested it, made the last finding, to wit: (Rec. 7, bottom of page.) "3rd. On June 13, 1863, the said commission notified the agent of Mrs. Walter Pugh, wife of the claimant, who had applied for release of a portion of the said proceeds, that the application was denied."

As to the objections to the jurisdiction of the Court of Claims, we will end this brief with copious extracts from the reports of the above cited cases in the Court of Claims, and also (for convenience of reference in connection with the opinions of the Court of Claims) from all the acts of Congress pertinent to the points. Upon these points the judges of the Court of Claims have always been unanimous, except that the present Chief Justice, after agreeing with his brethren, and indeed delivering the opinion in the case of Minor, (6 Ct. Cls., 393,) dissented from them in the case of Terry, (8 Ct. Cls., 277,) merely declaring his dissent without any reasoning. The Chief Justice, nevertheless, returned to his agreement with the other judges in Miss Moore's case, (10 Ct. Cls., 375,) the report of which case contains the latest opinions of the Court of Claims on the point respecting capture prior to March 12, 1863.

Act of July 13th, 1861, 12 Stats. at Large, 255.

CHAP. III. *An act further to provide for the collection of duties on imports, and for other purposes.*

SEC. 5. *And be it further enacted*, That whenever the President, in pursuance of the provisions of the second section of the act entitled, "An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose," approved February twenty-eighth, seventeen hundred and ninety-five, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then and in such case it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section, into the other parts of the United States, and proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States.

Act of July 17, 1862, 12 Stats. at Large, 589.

CHAP. CXCV.—*An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes.*

SEC. 5. *And be it further enacted*, That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of

all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply the same and the proceeds thereof for the support of the army of United States, that is to say, etc.

SEC. 6. *And be it further enacted*, That if any person within any State or Territory of the United States, other than those named as aforesaid, after the passage of this act, being engaged in armed rebellion against the Government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the estate and property, moneys, stocks, and credits of such person shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof, etc.

SEC. 7. *And be it further enacted*, That to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purpose aforesaid, proceedings in rem shall be instituted in the name of the United States in any district court thereof, or in any territorial court, or in the United States district court for the District of Columbia, within which the property above described, or any part thereof, may be found, or into which the same, if movable, may first be brought, etc.

Act of March 12, 1863. (12 Stat. L., 820.)

CHAP. CXX.—*An Act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the Secretary of the Treasury, from and after the passage of this act, as he shall from time to time see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property in any State or Territory or any portion of any State or Territory of the United States, designated as in insurrection against the lawful Government of the United States by the proclamation of the President, of July first, eighteen hundred

and sixty-two: *Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used for waging or carrying on war against the United States, &c.

SEC. 2. *And be it further enacted*, That any part of the goods or property received or collected by such agent or agents, may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal States, as the public interests may require; and all sales of such property shall be at auction, to the highest bidder, and the proceeds thereof shall be paid into the treasury of the United States.

SEC. 3. * * * * And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof, in the Court of Claims; and on proof to the satisfaction of said Court, of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof.

SEC. 6. *And be it further enacted*, That it shall be the duty of every officer or private of the regular or volunteer forces of the United States, or any officer, sailor or marine, in the naval service of the United States, upon the inland waters of the United States, who may take or receive any such abandoned property, or cotton, sugar, rice, or tobacco, from persons in such insurrectionary districts, or have it under his control, to turn the same over to an agent appointed as aforesaid, who shall give a receipt therefor; and in case he shall refuse or neglect so to do, he shall be tried by a court-martial, and shall be dismissed from the service, or, if an officer, reduced to the ranks, or suffer such other punishment as said court shall order, with the approval of the President of the United States.

Act of July 2, 1864. (13 Stat. L., 375.)

CHAP. CCXXV.—*An Act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection:*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sales of captured and abandoned property under the act approved March twelve, eighteen hundred and sixty-three, may be made at such places, in States declared in insurrection, as may be designated by the Secretary of the Treasury, as well as at other places now authorized by said act.

SEC. 2. *And be it further enacted,* That, in addition to the captured and abandoned property to be received, collected, and disposed of, as provided in said act, the said agents shall take charge of and lease, for periods not exceeding twelve months, the abandoned lands, houses, and tenements within the districts therein named, and shall also provide, in such leases or otherwise, for the employment and general welfare of all persons within the lines of national military occupation within said insurrectionary States, formerly held as slaves, who are or shall become free. Property, real or personal, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion.

SEC. 3. *And be it further enacted,* That all moneys arising from the leasing of abandoned lands, houses, and tenements, or from sales of captured and abandoned property collected and sold in pursuance of said act, or of this act, or from fees collected under the rules and regulations made by the Secretary of the Treasury, and approved by the President, dated respectively the twenty-eighth of August, eighteen hundred and sixty-two, the thirty-first day of March, and the eleventh day of September, eighteen hundred and sixty-three, or under any amendments or modifications thereof which have been or shall be made by the Secretary of the Treasury, and approved by the President, for conducting the commercial intercourse which has been or shall be licensed and permitted by the President, with and in States declared in insurrection, shall, after satisfying therefrom all

proper and necessary expenses, to be approved by the Secretary of the Treasury, be paid into the Treasury of the United States; and all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the Treasury; that the first section of the "act to provide for the collection of abandoned property, and for the prevention of fraud in insurrectionary districts in the United States," approved March twelve, eighteen hundred and sixty-three, is hereby extended so as to include the description of property mentioned in an act entitled, "An act further to provide for the collection of duties on imports, and for other purposes," approved July thirteen, eighteen hundred and sixty-one, and an act entitled, "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July seventeen, eighteen hundred and sixty-two, respectively; and that the sales provided for in said act first mentioned may be made at such places as may be designated by the Secretary of the Treasury. And section six, of the said first-mentioned act, is hereby amended so as to include every description of property mentioned in the acts of July thirteen, eighteen hundred and sixty-one, and July seventeen, eighteen hundred and sixty-two, aforesaid; and that all property, real or personal, described in the acts to which this is in addition, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged, either in arms or otherwise, in aiding or encouraging the rebellion.

SEC. 10. *And be it further enacted*, That all officers and privates of the regular and volunteer forces of the United States, and all officers, sailors, and marines in the naval service, are hereby prohibited from buying or selling, trading, or in any way dealing in the kind or description of property mentioned in this act and the act to which this is in addition, whereby to receive or expect any profit, benefit, or advantage to himself or any other person directly or indirectly connected with him; and it shall be the duty of such officer, private, sailor, or marine, when such property shall come into his possession or custody, or within his control, to give notice thereof to some agent appointed by virtue of this act, and turn the same over to such agent without delay. Any officer of the United States, civil, mili-

tary, or naval, or any sutler, soldier, marine, or other person who shall violate any provision of this act, or who shall take, or cause to be taken, into a State declared to be in insurrection, or to any other point to be thence taken into such State, or who shall transport or sell, or otherwise dispose of therein, any goods, wares, or merchandise whatever, except in pursuance of license and authority of the President, as provided in said fifth section of the act of July thirteen, eighteen hundred and sixty-one, aforesaid, and any officer or other person aforesaid who shall make any false statement or representation upon which license and authority shall be granted for such transportation, sale, or other disposition, and any officer or other person aforesaid who shall, under license or authority obtained, wilfully and knowingly transport, sell, or otherwise dispose of any goods, wares, or merchandise than such as are in good faith so licensed and authorized, or shall wilfully and knowingly transport, sell, or dispose of the same, or any portion thereof, in violation of the terms of such license or authority, or of any rule or regulation prescribed by the Secretary of the Treasury concerning the same, or shall be guilty of any act of embezzlement, of wilfull misappropriation of public or private money or property, of keeping false accounts, or of wilfully making any false returns, or of any other act amounting to a felony, shall be liable to indictment as for a misdemeanor, and fine not exceeding five thousand dollars, and to imprisonment in the penitentiary not exceeding three years, before any court, civil or military, competent to try the same. And it shall be the duty of the Secretary of the Treasury, from time to time, to institute such investigations as may be necessary to detect and prevent frauds and abuses in the trade and other transactions contemplated by this act, or by the acts to which this is supplementary: and the agents making such investigations shall have power to compel the attendance of witnesses, and to make examinations on oath.

HUDNAL'S CASE.

(3 Court of Claims Rep. 291.)

JOHN A. HUDNAL *vs.* THE UNITED STATES.

ON THE PROOFS.

A citizen of Northern birth, living in Texas at the beginning of the rebellion, abandons his business and leaves the State, rather than take an oath of allo-

giance to the Confederacy. An agent subsequently collects debts in cotton and sends it into the United States at Brownsville. It is seized by the military and sent to New Orleans. There the quartermaster sells it and uses the proceeds for military purposes. The Secretary of the Treasury informs the Senate that the quartermaster's accounts are under examination, and that the moneys received by him from abandoned or captured property will be credited to that fund.

(SYLLABUS.)

An action may be maintained and a decree rendered under the "Abandoned or captured property act," (12 Stat. L., p. 820,) when the "*net proceeds*" are constructively in the treasury, though not appearing in that fund, as where a quartermaster has expended them in the military service and his accounts are under examination in the Treasury Department, the quartermaster's department not having been yet charged with the moneys expended, nor the "*Abandoned property fund*" credited with the amount received.

CASEY, C. J., delivered the opinion of the court.

* * * * * * *

An objection was made on the argument to the recovery of the claimant, because Colonel Holabird sold the property, and, under the order of the general commanding the department, used the proceeds in providing for the wants of the army, and did not pay them over into the Treasury of the United States, as the 2d section of the act of March 12, 1863, requires.

It is true that Colonel Holabird, like many other quartermasters, either overlooked or entirely disregarded the provisions of that law. By the 6th section, it was made his duty, when that cotton was shipped to him, to have promptly turned it over to a Treasury agent, whose official duty it was to take charge of or dispose of it, and pay the net proceeds into the Treasury; and for his failure or neglect so to turn it over he was guilty of a military offense, liable to be court-martialed, reduced to the ranks, or suffer such other punishment as the court-martial might have ordered. And in undertaking to keep charge of the cotton and sell it, in violation of a plain and positive statute, he was not only not acting withing the scope of his duties and his powers, but in direct opposition to both, as defined by a clear and distinct congressional enactment. Had he embezzled the proceeds, or they had been lost by capture of the enemy, or by robbery or otherwise, it is questionable

whether the United States would have been liable for them to loyal claimants in any way or manner whatever.

We are, however, fortunately relieved from the necessity of considering or deciding any such question in the present case, by the fact that, so far as appears, Colonel Holabird has honestly and fully accounted for all the proceeds of the property sold by him. His action has been recognized and adopted by the executive Government and its various departments, to whom the enforcement and administration of these laws were committed. His accounts and returns on the subject, made to the War Department, were examined and approved. They have been submitted to the accounting bureaus of the Treasury Department, and fully settled and adjusted, and the net amount of the sales turned over to the captured and abandoned property fund. The following letter of the Secretary of the Treasury, in answer to a resolution of the United States Senate of the 29th of November, [October,] 1867, fully explains how the matter stood then:

"TREASURY DEPARTMENT, *November* 30, 1867.

"SIR: In reply to a resolution of the Senate of the United States of the 29th ultimo, calling on me to inform the Senate, at my earliest convenience, whether a sum of $834,529.34, which appears, from House of Representatives Ex. Doc. No. 97, second session 39th Congress, page 38, to have been received by Colonel S. B. Holabird, assistant quartermaster, chief quartermaster of the department of the Gulf, up to February, 1865, as the net proceeds of captured and abandoned property, and to have been used in the quartermaster's department as if belonging to the regular funds of that department, by direction of the major general then commanding the department of the Gulf, 'has been credited to the account of captured and abandoned property in the Treasury of the United States, and is included in the net sum realized from such property, as shown in said report; and whether the said sum of money has been charged to the account of the quartermaster's department; and if not so charged to the quartermaster's department, what legislation is necessary to effect that object?' I have the honor to state that the exhibit referred to, appearing in the Ex. Doc. No. 97, second session 39th Congress, shows the result of a preliminary examination of Colonel Hola-

bird's accounts by the quartermaster's department; that in the regular routine of official business they have been under examination for about a year last past in the office of the Third Auditor, which examination will probably be completed during the next two months; that whatever amount shall thereupon be ascertained to have accrued from the sale of captured and abandoned property, and to have been used for expenses of the quartermaster's department, will then be transferred, by Executive action already authorized by law, upon the statement of the Third Auditor, to the fund to which it belongs, and be charged against the quartermaster's department: and that no legislation is necessary to effect this object.

"I have the honor to state, further, that such amount is not included in the total net sum, shown by the report referred to, to have been thus far realized from captured and abandoned property.

"I have the honor to be, your obedient servant,

"H. McCULLOCH,

"*Secretary of the Treasury.*

"To the PRESIDENT *of the Senate of the United States.*"

This shows that the money is actually in the Treasury of the United States, and that nothing remained at the date of this letter but to adjust the matter between the War and the Treasury Departments, so as to secure regularity and system in the accounts, and have each debited and credited with the matters pertaining to their respective operations. With this the claimant has nothing to do. For his purpose it is sufficient to show that the Government is in possession of the proceeds of his property, and that he is under the law entitled to those proceeds. As to how the different executive officers may or ought to arrange their accounts and statements, cannot affect his rights; for as to him the Government is but one."

BARRINGER'S CASE.

(3 Court of Claims, 358.)

PAUL B. BARRINGER *vs.* THE UNITED STATES.

ON THE PROOFS.

The cotton of a loyal citizen in Mississippi is seized as abandoned, by the

army, in December, 1862. It is sold and the net proceeds are paid over by the quartermaster to the Treasury Department, and placed in the "Abandoned property fund." The claimant brings this action to recover them under the "Abandoned or captured property act" of March 12, 1863.

(SYLLABUS.)

An action will lie to recover the net proceeds of abandoned property, (they being in the treasury and credited to *the abandoned property fund*,) although the property was captured before the "*Abandoned or captured propertyy act*" was passed. This act is enlarged and extended by the act of July 2, 1864, (13 Stat. L., p. 375,) taken in connection with the acts of July 13, 1861, (12 Stat. L., p. 255,) and July 17, 1862, (Id., p. 589.)

CASEY, J., delivered the opinion of the court.

Mr. Stephen W. Wilkins, the military cotton agent at Memphis, proves that the same number of bales of cotton marked with Mr. Barringer's name across the bales was received by him for Captain A. R. Eddy, quartermaster at Memphis; and the same witness and Colonel Eddy prove that the cotton was sold either in January or February, 1863. The cotton was not sold by itself, but mixed with other lots of captured cotton sold at the same time. The net amount of sales of captured and abandoned property by Colonel Eddy amounted to $587,614.54. The following document shows it was regularly covered into the Treasury of the United States:

"B. [Miscellaneous—No. 167, second quarter of 1865.]

"To Captain A. R. EDDY.

"At sight pay to the Treasurer of the United States, or order, for the use of the said States $587,614.54, on account of captured and abandoned property, pursuant to an act of Congress approved March 12, 1863, &c.

"And for so doing this shall be your warrant.

"Given under my hand and the seal of the Treasury this 29th day of May, A. D. 1865, and of indpendence the 89th.

"H. MCCULLOCH,
"*Secretary of the Treasury.*

"Received June 17, 1865.

"F. E. SPINNER,
"*Treasurer United States.*

"$587,614.54.

"Countersigned.

"R. M. TAYLOR,
"*Comptroller.*

"Recorded.

"J. A. GRAHAM,
"*Acting Assistant Register.*

"Payment by war warrant No. 4394, dated 29th May, 1865."

On the argument of the cause it was contended by the solicitor for the United States that the claimant's case did not come within the provisions of the act of March 12, 1863, because the property was captured and sold by the military before the date of its passage. Standing on the act of 1863 alone, this objection would probably be fatal: but in connection with the 3d section of the act of July 2, 1864, (13 Stat. L., p. 375,) by which the act of 12th March, 1863, is extended so as to include the descriptions of property mentioned in the act of July 13, 1861, and the act of July 17, 1862, we think our jurisdiction can be sustained. The property was captured by the military because it was supposed the owner came within some of the clauses designated in the act of July 17, 1862, whose property should be seized and forfeited; but, by the provisions of the seventh section of that act, it was necessary to secure a judicial condemnation of the property before it could be sold, and directs the court in which such property, after seizure, may be libelled: "And if said property whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemy's property, and become the property of the United States, and may be disposed of as the court shall decree, and the proceeds thereof paid into the Treasury of the United States for the purposes aforesaid." We think the reason, spirit, and intent of this law cover this case, and bring it within the provisions of the act of 12th March, 1862. The different executive Departments of the Government have given that construction to it by having specific accounts made of the property seized and sold, and having those accounts adjusted between the War and Treasury Departments, and having the proceeds placed in the Treasury to the credit of the captured and abandoned property fund. Upon every view we have been able to take of this case we find nothing which should prevent the plaintiff's recovering. The average proceeds of the cotton sold in January and

February, 1863, was $307.30. At this rate the claimant's 106 bales will amount to thirty-two thousand five hundred and seventy-three dollars and eighty cents, ($32,573.80.) And this sum we award to him in the usual form."

MRS. MINOR'S CASE.

(6 Court of Claims Rep. 393.)

REBECCA A. G. MINOR, Executrix, *vs.* THE UNITED STATES.

ON THE PROOFS.

General Butler, commanding at New Orleans, orders a sequestration of property in certain parts of Louisiana, and appoints a commission of military officers to carry out the order. The commission is empowered to work abandoned plantations. It authorizes one F. to work five plantations, two of them the claimant's. From the five F. ships a known quantity of sugar and molasses, but only a part reaches the commission, and there is nothing to indicate the proportion contributed by each. The commission sells the property and carries the proceeds into one general account. The whole transaction takes place before the enactment of the Abandoned or captured property act, but the proceeds ultimately come into the abandoned or captured property fund.

(SYLLABUS.)

Where the proceeds of property captured and sold prior to the enactment of the *Abandoned or captured property act* have come into the Treasury and form a part of that fund, the act of 2d July, 1864, (13 Stat. L., p. 375, § 3,) has the effect, in connection with the former act, of conferring jurisdiction on this court, of a suit brought by a loyal owner to recover the net proceeds.

DRAKE, C. J., delivered the opinion of the Court:

"In November, 1862, Major General Butler, United States volunteers, commanding at New Orleans, the Department of the Gulf, ordered a sequestration of all the property in all that part of the State of Louisiana lying west of the Mississippi river, except the parishes of Plaquemines and Jefferson, and appointed a commission of military officers to carry out said order.

* * * * *

The 501$\frac{1}{5}$th hogsheads of sugar, and 1,764 barrels of molasses were sold by the commission. The whole transaction took place before the passage of the *captured and abandoned property act of March* 12, 1863; and it is therefore claimed that we have no jurisdiction to render any judgment for the claimant in the premises.

This is the same question that was before us in *Barringer's case*, (3 C. Cls. R., p. 358,) where we held that the third section of the act 2d July, 1864, had the effect, in connection with the act 12th March, 1863, of giving us jurisdiction over cases which had arisen prior to the last-named date. We adhere to the decision in that case, and hold that our jurisdiction extends to the case in hand."

TERRY & CARNE'S CASE.

(8 Court of Claims, 277.)

JAMES C. TERRY, Survivor, *vs.* THE UNITED STATES.

(ON THE PROOFS.)

In August, 1862, *one hundred and ninety-two bales of cotton are captured in Mississippi. Part of the proceeds are paid into the Treasury in November*, 1862, *and the remainder are accounted for by an officer of the Quartermaster Department in his settlement with the Treasury in January*, 1863. *Twenty-six bales are lost in transitu by a railroad company. Ten bales go into the possession of a forwarding house and are never accounted for. The Government neglects to prosecute these demands against the railroad and the forwarders.*

(SYLLABUS.)

The Court of Claims has jurisdiction of an action for the proceeds of captured property in the Treasury, although the capture and the payment into the Treasury were both prior to the passage of the Abandoned or captured property act.

The Court found the following facts:

* * * * *

(Page 278, argument of counsel for claimants.)

*The property was captured property of private citizens, non-combatants on the land, not in the immediate vicinity of any army, and not captured to prevent it from falling into the hands of the enemy or to be used in war. It must be regarded as property captured to save it for the benefit of any loyal owner. It was property of the description covered by the act of March 12, 1863, and by that of July 17, 1862. It was not paid into the Treasury in fact, because there was no law then to meet just such a case, and should

* This appears in the report as if it were a part of the *findings*, but seems to be in reality the argument of claimant's counsel.

have been held for the action of some tribunal, or until the passage of the captured and abandoned act, or other act of the Government, passed to meet such a case. After the passage of the act of November [March] 12, 1863, it should have been paid into the Treasury.

It was used by the Quartermaster Department to avoid drawing on the Treasury for a like amount. If the Quartermaster Department was bound to hold it for the rightful owner or for the future action of the Government, then surely the claimants are entitled to it in this suit. The law will regard that as done which ought to have been done, and treat these proceeds, for the purposes of this suit, as in the Treasury. This is a maxim peculiarly applicable to the Government, which cannot be guilty of laches, or charged with any wrong.

The property was captured or taken by the military under the act July 17, 1862, and it comes within the purview of the act March 2, 1864, relating to captured and abandoned property. It being thus taken, no quartermaster or other officer of the Government had any right to sell it, use, or dispose of it. He must hold it subject to condemnation and sale by proceedings in court under the seventh section of that act. It was only by such proceedings that the United States could get any title to it, and until it was so condemned as enemy's property for giving aid and comfort to the rebellion it was held subject to any legal principles that might follow from a pardon or amnesty under the fourteenth section of the act. The title to it was in no way changed by the capture and sale until after such condemnation. Klein, Adm'r, *vs.* The United States, 7 C. Cls. R., p. 240; The Morris Cotton, (8 Wall., 512;) McVeigh *vs.* The United States, (11 Id., 266, 267.)

The Government having converted the cotton into money without authority, must be required to hold it subject to the rights of parties entitled to it. If, then, it was in fact now on hand, and not technically in the Treasury, a fund in court or in the hands of some quartermaster, the court would, in a proper proceeding, order it into the Treasury for the purpose of awaiting proceedings in the mode now attempted in this suit. (Mrs. Alexander's Cotton, 7 C. Cls. R., p. 205.) But it is not a fund in court nor in the hands of any quartermaster, but it went into a special fund of the Government, and took the place of other money in the Treasury in the

payment of the legitimate expenses of the Government. This will be presumed until the contrary appears. Indeed, it is so stated. Wright *vs.* The United States, (5 C. Cls. R., 119;) King *vs.* Hawkins, (10 East, 210;) Williams *vs.* East. Ins. Co., (3 Id., 199;) King *vs.* The Inhab. of Holsingfield, (2 M. & S., 561.)

The case of Barringer (3 C. Cls. R., 316) has determined that a recovery may be had for property taken and sold by the Government and used by it prior to March 12, 1863; and this also results from the general principles above stated that forbid the forfeiture of private property of non-combatants.

NOTT., J., delivered the opinion of the court.

No question of law is presented in this case which has not been heretofore considered and determined, and the only question of fact goes to the quantity of cotton which the claimant contributed to a common fund.

* * * * * * *

DRAKE, Ch. J., dissenting:

I am unable to concur in rendering a judgment for the claimant in this case, because in my opinion this court has no jurisdiction of any claim for property captured and sold prior to the passage of the act March 12, 1863.

MISS MOORE'S CASE.

(10 Court of Claims, 375.)

SOPHIA B. MOORE, by her Guardian, *vs.* THE UNITED STATES.

ON THE PROOFS.

On the capture of New Berne, March 14, 1862, *certain rosin and turpentine are seized and sent to New York and Philadelphia. They are sold and the proceeds paid into the Treasury under a decree of the district court. In July*, 1864, *certain buildings in New Berne are taken possession of as abandoned, and are leased by the agents of the Treasury, and the rents collected and paid into the abandoned or captured property fund. The owner's legatee brings suit under the Abandoned or captured property act for the proceeds of the captured property and for the rents of the buildings.*

(SYLLABUS.)

1. The abandoned or captured property act, (12 Stat. L., 820,) and the act in addition, &c., (13 Stat. L., 375,) are in *pari materia*, and the remedy given by the former is effective for the rights given by the latter. Hence a suit may be maintained for the rents of abandoned buildings collected by

Treasury agents and paid into the Treasury, though the former statute relates only to personal property, and the latter (which authorizes the seizing and renting of abandoned buildings) does not in terms give the owner a right of action for the moneys collected.

II. The right to the proceeds of captured property given to loyal owners by the act of March 12, 1863, (12 Stat. L., 820,) is carried back to the time of the passage of the act July 17, 1862, (Id., 589,) by the act July 2, 1864, (13 Id., 375.) But it *cannot be carried further*. Therefore property captured before the 2d July, 1862, passed absolutely to the Government, and the owner has no right or property in the proceeds.

RICHARDSON, J., delivered the opinion of the Court:

The first claim is for the rent of lands and houses taken possession of and leased as abandoned property in a State in rebellion, under the provisions of the act July 2, 1864, (13 Stat. L., p. 375, §§ 2, 3,) by an agent of the Treasury Department, appointed under the act March 12, 1863, (12 Stat. L., 820.) This last-mentioned act, which was the first enacted, did not apply to real-estate, but was clearly restricted to personal property, which alone could be "collected and sold." By section 1, the Secretary of the Treasury was to appoint a special agent or agents to receive and collect all abandoned and captured property in any State or Territory of the United States designated as in insurrection against the lawful Government of the United States, by the proclamation of the President, of July 1, 1862; and by section 2, any of the goods or property received or collected by such agent or agents, might be appropriated to public use, or forwarded to any place of sale within the loyal States; and the proceeds of all sales were required to be paid into the public Treasury.

A right of action was given to loyal owners of such property so collected and sold to recover the proceeds thereof, by the following clause of section 3:

"And any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof, in the Court of Claims, and on proof, to the satisfaction of said Court, of his ownership of said property, of his right to the proceeds thereof, and that he has never given aid or comfort to the present rebellion, to receive the residue of such proceeds,

after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expense attending the disposition thereof."

* * * * *

The act of July 2, 1864, provides, in section 2:

"That in addition to the captured and abandoned property to be received, collected, and disposed of, as provided in said act, [of March 12, 1863,] the said agents shall take charge of and lease, for periods not exceeding twelve months, the abandoned lands, houses, and tenements within the districts therein named;" and, in section 3, "that all money arising from the leasing of abandoned lands, houses, and tenements, or from sales of captured and abandoned property, and sold in pursuance of said act, or of this act, [* * * after deducting expenses,] shall be paid into the Treasury of the United States." But no right of action is expressly given in this act, to loyal owners of real-estate, to recover the rents thus collected and paid into the Treasury, and none exists, unless that which is contained in the former act, and which we have cited above, applies to rents so collected under the later act. And we are of opinion that it does so apply, and that the petitioner is entitled to recover. We can conceive of no reason why the United States should return to loyal owners the proceeds of abandoned personal property, and withhold from them the rents and income of abandoned lands and tenements, and we think no such distinction is warranted by a proper construction of the statutes.

The act of 1864, is in addition to that of 1863. It added another class of property to that which the agents, appointed by the Secretary of the Treasury, were to take possession of. The two acts, being on the same subject, must be construed together, and when so construed, the right of action given in the first act applies to the second precisely the same as though it had been repeated therein; and gives to loyal owners the right to recover the proceeds of rents collected from abandoned lands paid into the Treasury by such agents. This principle of construction is supported by judicial authority. In Holbrook *vs.* Nichols, (36 Ill., 161,) the Supreme Court of Illinois held that an amendment of a former act operated precisely as if it had been added to

the prior act, as to proceedings subsequent to the later statutes. In Rogers *vs.* Bradshaw (20 Johns, 744,) the point was taken that a remedy given by a statute of the Legislature of New York, passed in 1817, did not apply to acts done under a statute upon the same subject-matter in 1820. But the court of errors held otherwise, and the chancellor, in delivering the opinion, says: "All statutes," said Lord Mansfield, (Doug., 20,) "which are *in pari materia* are to be taken together, as if they were one law; and in many instances a remedy provided by one statute will extend to cases arising on the same subject-matter under a subsequent statute."

The supreme court of New York adopted the same principle in Rexford *vs.* Knight, (15 Barb., 627,) wherein it was decided that the State became seized of the same estate in lands taken under the act of April, 1819, for the continuation of the Erie Canal, as it had in those appropriated by virtue of the previous act of April, 1817, for the construction of said canal, although the title of the State to lands taken was expressly provided for only in the act first passed.

To the second claim for the proceeds of rosin taken possession of by an agent of the Treasury Department, sold, and the proceeds paid into the Treasury, no defense in law is set up, and the petitioner is entitled to recover the amount set forth in the second finding. The property was collected under the provisions of the act of March 12, 1863, and sold in the place where it was collected, as authorized by an amendment of that statute in the act of July 2, 1864.

The third claim is for rosin and turpentine captured on land by the combined naval and military forces of the United States, at the time of the capture of New Berne, in March, 1862.

* * * * *

In three cases this Court has held that an action would lie to recover the net proceeds of abandoned property, captured before the abandoned and captured property act (of March 12, 1863,) was passed, by virtue of the act of July 2, 1864, (13 Stat. L., 375,) Barringer's Case, (3 C. Cl's, R. 358,) Minor's Case, 6 C. Cl's, R. 393,) and Terry & Carne's Case, (8 C. Cl's, R. 277.) But in each of these cases the property was captured or seized after the passage of the act of July 17, 1862, (12 Stat. L., 589,) and came within the

description of property mentioned in that act, and so by virtue of the act of July 2, 1864, (13 Stat. L., §§ 3, 376,) was held to be included in the provisions of the first section of said act of March 12, 1863, and as to which, by the third section, a right of action to loyal owners to recover the proceeds thereof is given.

But in the case at bar, the rosin and turpentine of the claimant's testator were captured March 2, 1862, were taken into a State not in rebellion, and libeled by the civil authorities, in April or May, 1862. This was two months at least before the passage of the act of July 17, 1862, making provision for the seizure and disposition of the property of persons engaged in rebellion against the Goverment of the United States, and this property came within none of the provisions of that act. That act described the property of certain official persons, of whom the claimant's testator was not one, and of others who, being engaged in armed rebellion, should not, within sixty days after public warning and proclamation made by the President, cease to aid, countenance, and abet the rebellion; and it authorized the seizure, condemnation, and confiscation of such property, for which special provisions were herein made. This act clearly related to property thereafter seized, and did not affect the rights of the United States to property previously captured, and to the proceeds of property seized and sold as booty and paid into the public Treasury. The act offered an inducement to persons in rebellion to return to their allegiance, and save the property which they still had in possession, but did not offer to them money in the Treasury arising from property which they had previously lost or forfeited by the events of the war. It will be noticed that the act of July 2, 1864, § 3, does not in terms extend the whole act of March 12, 1863, to the description of property mentioned in the two previous acts, but extends only the first section, authorizing the collection of property by the Treasury agents; and the sixth section, directing officers and soldiers to turn over to such agents all captured property. The third section of the act of 1863, which gives the right of action upon which the claimant relies, is not extended in terms, and if it applies at all to any other property than that specified in the first section, it is because the Treasury agents did receive, or *should have received*, such under some other provision of law. That they did re-

ceive this property is not claimed, and that they could not have received it is apparent. When the act of 1863 was passed the property was not in a State in rebellion, but in a loyal State, nor was it in the control of the military or naval authorities, *but was in the custody of the civil authorities* of Pennsylvania; and when the act of July 2, 1864, was passed, extending the act of 1863, as we have mentioned. the property had been sold and the title was vested in other parties, and the money had been paid into the Treasury.

The construction contended for by the claimant would lead to the result that we should apply to this property now in controversy the third section of the act March 12, 1863, which is not in terms extended, while the first section of that act, which is extended, and through which alone the third section become operative, if at all, could not possibly apply to it.

In our opinion the act July 2, 1864, was not intended to be so far retroactive in its operation as to give parties a right to recover from the public Treasury *all* the money that had been paid into it from the beginning of the war on account of captured property seized before Congress made any regulations in relation to it. The property now claimed was booty, which the courts have held not to belong to the officers and men engaged in its capture, but to belong to the sovereign, the proceeds of which go to the public Treasury, unless the sovereign allows it to the individual captors.

We recognize the "humane maxims of the modern law of nations which exempt private property of non-combatant enemies from capture as booty of war," (Klein's case, 7 C. Cls. R., 243, 13 Wall., 128,) and the constitutional provision that Congress has power to "make regulations concerning captures on land and water," (Constitution, art. 1, sec. 8. par. 11,) but until Congress makes the necessary regulations and confers the authority this court has no jurisdiction to compel the United States to refund money obtained contrary to those maxims. Before Congress made regulations and enacted laws in relation to the seizure and disposition of the enemy's property all the property so seized became vested in the United States by the rigorous rules of earlier warfare, which were justified on the ground that the power and the resources of the enemy were weakened and those of the captors strengthened thereby; and now that Congress has made some laws for returning the proceeds of captured and

abandoned property in specified cases, this court, with its limited power, can take no jurisdiction beyond that which is clearly and expressly given by statute.

The conclusion which we have reached is, that the claimant is entitled to recover on the first and second findings $13,497.50, for which amount judgment in his favor will be entered.

LORING, J., dissenting:

"I dissent from the opinion read. I think the petitioner is entitled to recover for the 2,000 barrels of rosin, &c., specified as the third item in the statement of facts.

"When the rosin was captured in March, 1862, North Carolina had been declared to be in a state of rebellion. But in that and the other disloyal States there were many loyal persons, who were of right entitled to the protection of the Government in person and property as the return due to allegiance; for they were citizens of the United States, and no action of their States could exclude them from that citizenship or the rights consequent on it. In these circumstances the Government adopted the policy of restoring to such loyal persons the proceeds of their captured property paid into the Treasury. And this policy grew out of the circumstances stated. It was not created by the *act March* 12, 1863, for that act was only the remedy and the means of carrying into effect the policy. Now, certainly this case is within that policy, for the owner of the property captured was loyal, and its proceeds are in the Treasury, and the only objection to the recovery is that the property was captured before the *act July* 17, 1862, or the act *March* 12, 1863, was passed. But remedial statutes may be and are extended to transactions anterior to their enactment; and where the case is within the policy, but not within the letter of the statute, that may be so extended by construction as to bring the case within the equity of the statute. The old example of this is that given by Mr. Dwarris of the case of a devise of a joint use in lands, made long before lands were devisable in England, and when, of course, such a devise had no legal effect. But after lands were made devisable by the statute of Henry VIII, this devise of the jointure was supported under the statute, as being within its equity. And the decision has been held authoritative, and ever since followed in text-

books and decisions, and I think this case, in which the property was captured from a loyal citizen, and its proceeds paid into the Treasury, is within the equity of the statute of 12th March, 1863, and the policy it was intended to carry out. All previous statutes related to crime and the property of criminals, and were not in *pari materia* with the third section of the *act March* 12, 1863, which related exclusively to loyal owners who had kept their loyalty in disloyal States. And I think the admitted policy of the Government precludes the inference that the purpose of its legislation was to secure to such loyal owners their property captured after, and to deprive them of their property captured before, 12th March, 1863."

The conclusion of Judge Loring's dissenting opinion is a little inaccurate, perhaps, for the other judges did not deny, but, on the contrary, had plainly declared, in the majority opinion, that a suit was maintainable for proceeds of property captured prior to March 12, 1863, *provided* the capture was subsequent to the act of *July* 17, 1862. Judge Loring's opinion was that the remedy provided by the act of March 12, 1863, applied to the proceeds of *all* property captured during the war.

The difference of opinion between him and the other judges is sharply defined in the following words (10 Ct. Cls., 382,) of Judge Richardson, delivering the opinion of the majority:

"In our opinion, the act of *July* 2, 1864, was not intended to be *so far* retroactive in its operation as to give the parties a right to recover from the public Treasury *all* the money that had been paid into it from the beginning of the war on account of captured property seized before Congress made any regulations in relation to it."

The letter of the Secretary of the Treasury, dated Nov. 30, 1867, set out in full in the opinion delivered by Chief Justice Casey in Hudnal's case, (3 Ct. Cls., 295, 296,) is Senate Executive Document, No. 4, second session of the 40th

Congress. It will be noticed that the Secretary says that the transfer of proceeds of captured and abandoned property to the captured and abandoned property fund will be made "by executive action already authorized by law," and "that no legislation is necessary to effect this object."

Apparently, the Secretary deduced this authorization by law from the acts of July 17, 1862, (12 Stat. L., 589,) March 12, 1863, (12 Stat. L., 820,) and July 2, 1864, (13 Stat. L., 375.) In other words, the Secretary construed those acts just as the Court of Claims subsequently did. He declared that "no legislation is necessary to effect this object"—that is, the transfer of the proceeds to the "abandoned and captured property fund."

All the Departments of the Government seem to have been satisfied with this construction of the Secretary of the Treasury and of the Court of Claims, until now, when the Department of Justice seems disposed to call it erroneous. That Department has acquiesced for a long time, however. The judgment of this court seems never to have heretofore been sought on the subject, although there have been many opportunities for so doing. For, besides the cases above cited, where the Court of Claims delivered opinions, there have been others depending upon the same construction of the law, probably many others, where judgment was rendered for claimant without opinion.

Among them are the following, as stated in List of Judgments of the Court of Claims, in vol. 9 of the Reports of that Court:

"Searing Taylor, executor of Miles Taylor *vs.* The United States.

"Dec. term, 1873, (vol. 9 Ct. Cls., 507.)

"For proceeds of sugars which came into the hands of the sequestration commission, at New Orleans, and which proceeds were covered into the Treasury of the United States.

"Judgment for claimant, $12,736.91."

"Julia A. Ventrees, dative testamentary executrix of James N. Brown, *vs.* The United States.

"Dec. term, 1873, (9 Ct. Cls., 508.)

"To recover the value of products taken from Oakland plantation, Louisiana, sold, and the proceeds paid over to the United States sequestration commission.

"Judgment for claimant, $13,862.84."

The following seems to be a correct summary of the effects of the foregoing acts of Congress, so far as they control this case:

Section 3, of the act of July 2, 1864, (13 Stat., 376,) *extends* section 1, of the act March 12, 1863, (12 Stat. L., 820,) so as to include the descriptions of property mentioned in the act of July 17, 1862, (12 Stat. L., 589.)

The section 1, act March 12, 1863, which is thus *extended*, authorizes the appointment of special agents to receive and collect abandoned or captured property.

The descriptions of property to which this section 1 is thus extended, are expressed in section 6, act July 17, 1862, (12 Stat. L., 591,) to be "all the estate and property, moneys, stocks, and credits," of persons who should not return to their allegiance within sixty days after proclamation by the President.

The proclamation was issued July 25, 1862, (12 Stat. L., 1266.)

Under the act of 1864, therefore, the special agents of the Treasury were entitled to demand and receive all moneys and credits belonging to Pugh, and were bound to pay the same into the Treasury.

But again, section 3, of the act of 1864, *amends* section 6, of the act of March, 1863, so as to include every description of property mentioned in the act of July, 1862.

The section 6, of act of 1863, requires that every officer, soldier, or sailor, having control of any abandoned or cap-

tured property, ~~to~~ shall turn it over to a special agent of the Treasury. The property referred to in section 6, act of 1863, as under the control "of officers of the army, &c.," must certainly have included property already captured, but remaining in their hands, at the date of the act of March 12, 1863.

By force of this amendment, declared in said act of 1864, the duty of officers, soldier, sailors, &c., expressed in section 6, act of 1863, was extended so as to include "all the estate, and property, *moneys*, stocks and credits," of persons who had not returned to their allegiance. (Sec. 6, act of 1862, 12 Stat. L., 591.)

Hence, immediately upon the passage of the act of July 2, 1864, (13 Stat. L., 375,) it became the *right and duty* of the Treasury special agent, to demand and receive from Colonel Holabird, Quartermaster Department of the Gulf, the moneys belonging to Pugh, and resulting from the sale (February 4, 1863,) of the sugar and molasses; and it, at the same time, and equally, became the duty of the quartermaster, under penalty of reduction to the ranks, to turn the moneys over to the Treasury agent, who would have paid it into the Treasury.

Instead of turning it over to the agent, however, the quartermaster accounted for them himself to the Treasury, "on the final settlement of his accounts, and the same was credited by the Secretary of the Treasury, to the abandoned and captured property fund in the Treasury." (Finding II.)

Instead of a Treasury agent paying the money into the Treasury, it was paid in by the quartermaster, and the Secretary, as authorised by law, put it into the captured property fund.

But a further question is whether the fact of Pugh's sugar and molasses having been seized prior to the act of March

12, 1863, cuts him off from the remedy granted by the third section of the act. (12 Stat. L., 820.)

And to hold that it does cut him off would certainly be a most harsh construction of statutes intended to operate protection, benevolence, and justice, to those who should hold their loyalty fast and true under circumstances which required a splendid courage and fidelity so to do. For it will not be forgotten that the remedy provided by section three of the act of 1863 was applicable only to loyal persons. This is not to be forgotten in considering the *intention* of the act of 1864 in regard to *extending* that remedy to property captured under the act of July 17, 1862. The effect of the general amnesty proclamation of 1868 is not an element of consideration in judging of the intention of the act of 1864.

Pugh's property was seized in December, 1862: it was sold in February, 1863. The proceeds belonged to him, for his title had never been divested by judicial proceedings, as provided for by the act July 17, 1862. The money belonged to him at the date of the passage of the act of 1863. It seems to us that, irrespective of the act of 1864, the Treasury agent might have claimed the money from Holabird immediately after the act of March 12, 1863, was passed, and that Holabird would have incurred all the penalties of the act of 1863 by refusing to pay it over. For what difference in reason could it make that the *money* was not the identical article captured? The proceeds in Holabird's hands were the net result and fruit of it. But however that may be, the act of 1864 expressly extended the right and duty of the Treasury agent to claim and receive, and the duty of Holabird, the quartermaster, to pay over to the agent the moneys of Pugh. They were then (when the act of 1864 was passed) in Holabird's hands, as he did not account for them until "the final settlement of his accounts."

The construction which we now contend against, and which was repudiated not only by the Court of Claims, but

by the Secretary of the Treasury himself, as long ago as 1867, would have the following absurd result, viz: That however devoted and magnificent Pugh's loyalty may have been, and although his sugar and molasses was seized long after the act of July 17, 1862; though his title was never divested; though his money was in the hands, on March 12, 1863, and July 2, 1864, of an officer of the army, who was solemnly enjoined by the last act, at least, to pay it over to a special agent, that it might go into the captured property fund; and though Holabird did finally pay it into the Treasury, and the Secretary did put it into that fund, yet Pugh could not sue for these proceeds because his sugar was not captured until December, 1862, and the proceeds were never, *literally speaking*, *captured* at all. Was not loyalty between July 17, 1862, and March 12, 1863, as much entitled to favor as loyalty *after* March 12, 1863.

No remedy at the suit of a loyal owner was provided until the act of 1863, for the very simple reason that under the act of July 17, 1862, his title could not be divested except by judicial proceedings, and could not be condemned in such proceedings if he showed his loyalty. The act of 1862, did not allow a sale without judicial proceedings. But the act of 1863 *commanded immediate sale*, and gave a loyal man an equivalent remedy by suit in the Court of Claims for the proceeds.

Suppose a lot of sugars had been seized under the act of 1862, brought to New Orleans with the purpose of libeling it, but that for any reason it was not libeled, and remained in New Orleans in possession of the military, when the act of 1863 was passed, would not the Treasury agents have been bound to take possession of it? (See sec. 6, act of March 12, 1863.) And if the agent had sold it and paid the proceeds into the Treasury, would not a loyal owner have had a standing in the Court of Claims to recover the proceeds?

According to the doctrine of counsel for appellants, the court would have no jurisdiction, because the property had

been seized under the act of 1862, and not under that of 1863.

And yet the result in point of profit to the United States would be precisely the same as if the property had *been captured after March*, 1863. But not so to the loyal owner. If the sugar had been libeled, the owner, upon making claim and proving his loyalty, could have secured its redelivery to him. But after the sale, under the act of 1863, such claim as the owner had would have been transferred to the *proceeds*. But, says counsel for the appellant, though these proceeds had been duly paid by the agent into the captured property fund, the owner could not maintain a suit in the Court of Claims, because the property was captured under the act of 1862, and prior to the act of March 12, 1863, which, he says, is prospective merely, and the remedy granted by which is not made retroactive by the act of 1864: and this, although by directing *sales* of captured property the act of 1863 deprived loyal owners of the remedy allowed them by the act of 1862. We suppose everybody will admit that such a construction of the acts of Congress would counteract the policy and motive—in other words, the *intention*—of the act of 1862, which must have been to protect loyalty and encourage a return to loyalty. This construction, however, attributes to the act of 1863, the effect of violating the promise held out by the act of 1862 to those who were loyal, or who should return to their allegiance within sixty days after the issuance of the presidential proclamation, (which was, in fact, issued July 25, 1862, 12 Stat. L., 1266,) and to leave them without any remedy at all in respect to property captured prior to the act of 1863. How could the remedy of a loyal owner *under the act of* 1862 (by making claim before the court and obtaining a redelivery upon proof of his loyalty) be preserved under the act of 1863, which provided for the immediate *sale* of all captured property?

Pugh's sugar and molasses was captured after the act of 1862. It was not, therefore, booty of war: but, having been

brought into New Orleans, was required by the act of 1862 to be libeled in the United States court there. It was not libeled, however, and consequently Pugh's title thereto was not divested, and after the sale his title was just as good to the proceeds. The proceeds should have been turned over to the Treasury agent, who would have put them into the captured property fund; but Holabird accounted for them himself to the Treasury, and the Secretary himself put them into that fund, declaring himself authorized by law so to do, and informing the Senate that no further legislation was necessary in the premises.

"In the construction of statutes the sense which the cotemporary members of the profession had put upon them is deemed of some importance, according to the maxim that *contemporanea expositio est fortissima in lege.* Statutes that are remedial, and not penal, are to receive an equitable interpretation by which the letter of the act is sometimes restrained and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. They are constructed liberally and *ultra*, but not *contra* the strict letter." (Kent 1, 464, 465.)

"Several acts *in pari materia*, and relating to the same subject, are to be taken together and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule was declared in the cases of *Lex vs. Loxdale*, and the Earl of Ailesbury *vs.* Pattison; and the rule applies, though some of the statutes may have expired, or are not referred to in other acts. The object of the rule is to ascertain and carry into effect the intention: and it is to be inferred *that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.*" (Kent 1, 463, 464.)

But for the acts of 1862, 1863, and 1864 private property of loyal subjects captured in the insurrectionary districts would have been booty of war, and no remedy available for the recovery of its proceeds.

These acts, therefore, are remedial.

"Remedial Statutes."—"There can be no question," says Mr. Dwarris, (1 Dwarris, p. 463) "that the words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy." (Sedgwick, 359.)

"'In remedial cases,' says Lord Mansfield, (Com., pp. 382–391,) 'the construction of statutes is extended to other cases within the reason and rule of them.' So again, it has been held in the case of a remedial act that everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it." (Johnes *vs.* Johnes, 3 Dow, 15: Dwarris, 654:) Sedgwick, 360.

"In this country, too, it has been repeatedly held that remedial or beneficial statutes are to be liberally construed." (Admx. of Tracy *vs.* Admr. of Card, 2 Ohio State Rep. N. S., 431;) Sedgwick, 361.

Sampeyreac *vs.* The United States, 7 Peters, 222: "Almost every law providing a new remedy affects and operates upon causes of action existing at the time the law is passed. The law of 1830 is in no respect the exercise of judicial powers; it only organizes a tribunal with the powers to entertain judicial proceedings. The act, in terms, applies to bills filed or to be filed. Such retrospective effect is no unusual course in laws providing new remedies."

"Laws are to be construed *strictly* to save a *right* or avoid a penalty, and *liberally* to give a *remedy* or effect an object declared in the law." 3d Circ., (Pa.,) 1831; Whitney *vs.* Emmett, 1 Baldw., 303. (Cited from Abbott's Dig., vol. 4, p. 232.)

"A statute may be penal in one part and remedial in another. (Hyde *vs.* Cogan, Douglas, 702: Dwarris, 655.) And in the same act of Parliament a strict construction may be put on a penal clause and a liberal construction on a remedial clause. This has been done in regard to the statutes which make it a felony to burn a house or other property, and, at the same time, give those who suffer from the felony a remedy against the hundred." (Dwarris, 656; Sedgwick, 362.)

As bearing upon the construction put by the Secretary of the Treasury upon the laws which, as he declared in his

letter of November 30, 1867, (*ante*,) authorized his action in crediting to the abandoned and captured property fund the proceeds accounted for by the quartermaster of the Department of the Gulf. Col. Holabird, we cite the following cases in this court:

Edward's Lessee *vs.* Darby, 12 Wheaton, 210: "In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to carry its provisions into effect is entitled to very great respect."

The United States *vs.* The State Bank of North Carolina, 6 Peters, 29: "The priority of the United States extends as well to debts by bonds for duties which are payable after the insolvency or decease of the obligor as to those actually payable or due at the period thereof."

Page 39, Story, J.: "It is not unimportant to state that the construction which we have given to the terms of the act is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons as well as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would of itself furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act; but, if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

Joseph Grant and others *vs.* E. and H. Raymond, 6 Peters, 218:

"Action for damages for an infringement of a patent right, granted to the plaintiff in 1825. The patent recited that a former patent had been issued in 1821 to the same person for the same improvement, which had been cancelled owing to the defective specification on which the same was granted. The exclusive privilege given by the patent on which the suit was brought is to continue fourteen years

from the day on which the original was issued. On the trial the defendants objected that the Secretary of State had no power, by law, to accept a surrender of, and to cancel, the first letters patent: or to inquire into, and decide upon, the causes for so doing; or to grant the second patent for the same invention, with an amended specification, for the unexpired portion of the term of fourteen years which had been granted by the first patent. The circuit court of the southern district of New York decided, in conformity with its former decisions, that such surrender might be made when the defect arose from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee: and that the Secretary of State had authority to accept such surrender, and cancel the record of the patent; and to issue a new patent for the unexpired part of the fourteen years granted *under the* patent."

By the Court, (*per Chief Justice Marshall*, p. 244.):

"*It will not be pretended that this question is free from difficulty. But the Executive departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it settled. We would not willingly disregard this settled practice in a case where we are not satisfied it is contrary to law, and where we are satisfied that it is required by justice and good faith.*"

We beg leave to apologize for the length of this and our former Brief, in a cause involving so small an amount. But it is the fault of the defendants, who, after acquiescing since 1867 in the construction put upon the law by the Treasury Department and the Court of Claims, and refraining from appealing from judgments for much larger amounts, saw fit to appeal in the present case, involving only a little more than $4,000; raising questions which they never troubled your Honors with before.

Respectfully submitted.

EDWARD JANIN,
Of Counsel for Appellee.